103

(1)

Supreme Court, U.S.
FILED

No. 08- 08-220 AUG 18 2008

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DANA GRESBACH,

Petitioner,

v.

MICHAEL C., CHERITA C., KIMBERLY W., ALEXIS C, and IAN W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. MODL
Counsel of Record
BRIAN C. HOUGH
AXLEY BRYNELSON, LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 – fax
mmodl@axley.com
bhough@axley.com

Counsel for Petitioner

217274

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, during the course of a child abuse investigation not involving law enforcement, a child protective services worker's brief visual examination of non private areas of the body of a child suspected of being abused, after the child confirms a report that his stepfather struck him with a plastic stick, is an unreasonable search for purposes of the Fourth Amendment.

2. Whether the standard under the Fourth Amendment for determining whether a child protective services worker conducting a child abuse investigation at a private school, where the alleged abuser is the child's parent, is a reasonableness standard or a higher standard requiring probable cause and a warrant.

3. Whether the special needs doctrine is an exception to the Fourth Amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker.

4. Whether Fourth Amendment jurisprudence was clearly settled in a particularized sense such that a reasonable child protective services worker would have known that, during the course of a child abuse investigation, her brief visual examination of non-private areas of the child's body following the child confirming a report that his stepfather had struck him with a plastic stick violated the Fourth Amendment, thereby forfeiting the worker's right to qualified immunity from suit and liability.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed on the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
INTRODUCTORY PRAYER	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. Summary	2
B. Procedural History	3
C. Statement of Facts	5
D. Jurisdiction of the District Court and Court of Appeals	11

Contents

	Page
REASONS FOR GRANTING THE PETITION ..	11
A. Summary of Reasons Relied on for Granting The Writ	11
B. Lower Federal Courts Are Split On Whether Courts Must Initially Address The Fourth Amendment's Threshold Question of "Unreasonableness" When Analyzing A Child Protective Services Worker's Visual Examination Of Non Private Areas Of A Child's Body Incident To A Child Abuse and Neglect Investigation.	17
C. Lower Federal Courts Are Split On Whether A Reasonableness Standard Or The Fourth Amendment's Probable Cause And Warrant Requirements Should Apply To A Child Protective Services Worker's Visual Examination Of Non Private Areas Of A Child's Body Incident To A Child Abuse and Neglect Investigation.	21
D. Lower Federal Courts Are Split On Whether The Special Needs Doctrine Is An Exception To The Fourth Amendment's Warrant Requirement In Child Abuse And Neglect Investigations By A Child Protective Services Worker.	23

Contents

Page

E. The Law Was Not Clearly Settled That A Child Protective Services Worker's Visual Examination Of Non Private Areas Of A Child's Body Incident To A Child Abuse And Neglect Investigation Violated The Fourth Amendment. 26

CONCLUSION 31

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided May 19, 2008 ..... 1a

Appendix B — Decision And Order Of The United States District Court For The Eastern District Of Wisconsin Dated And Filed March 19, 2007 ..... 21a

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987) 28

Board of Educ. v. Earls, 536 U.S. 822 (2002) ... 23

Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S.Ct. 1943 (2006) 17

Calabretta v. Yolo County Dep't of Soc. Servs., 189 F.3d 808 (9th Cir. 1999) 18, 29

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) ..... *passim*

Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) 18-19, 23, 24

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 24

Franz v. Lytle, 997 F.2d 784 (10th Cir. 1993) ... 24

Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087 (3d Cir. 1989) 18

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 27

Cited Authorities

Page

Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000) .. 20, 28, 29

Mitchell v. Forsyth, 472 U.S. 511 (1985) 11

New Jersey v. T.L.O., 469 U.S. 325 (1985) .. 18, 19, 24

Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395 (5th Cir. 2002) ..... *passim*

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2152 (2001) 13, 16, 27

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) 19, 24

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 18, 28

United States v. Biswell, 406 U.S. 311 (1972) .. 28

United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219 (1997) 17, 19, 23

Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 17, 19, 23

Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993) 18, 21, 22, 24

Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692 (1999) 27

Cited Authorities

Page

Wojcik v. Town of N. Smithfield, 76 F.3d 1 (1st Cir. 1996) 18, 24

Wyman v. James, 400 U.S. 309 (1971) 20

Wyoming v. Houghton, 526 U.S. 295 (1999) 17

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 11

28 U.S.C. § 1331 11

28 U.S.C. § 1343 11

42 U.S.C. § 1983 ..... 4, 11, 27

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV 4

Wisconsin Constitution 4

Cited Authorities

Page

OTHER AUTHORITIES

Administration for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Maltreatment* (2006) . 10, 11

INTRODUCTORY PRAYER

The Petitioner respectfully requests that the United States Supreme Court grant a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 19, 2008.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Wisconsin, issued on March 19, 2007, is reported at 479 F.Supp.2d 914 (E.D. Wis. 2007) and has been included in the appendix on pages 21a-44a. The Opinion of the United States Court of Appeals for the Seventh Circuit, issued on May 19, 2008, is reported at 526 F.3d 1008 (7th Cir. 2008) and has been included in the appendix on pages 1a-20a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on May 19, 2008. This Petition is timely filed according to Supreme Court Rule 13.1. The Court derives its jurisdiction from 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Summary

Child abuse and neglect is a nationwide epidemic directly affecting nearly one million children annually. There were approximately 3.6 million child abuse and neglect referrals in the year 2006. Local and State agencies around the country referred these abuse and neglect reports to child protective services workers for investigation. Investigations almost uniformly involve interviews of the children suspected of being abused and frequently include examinations of the children's bodies for signs of physical abuse.

Lower federal courts have applied the Fourth Amendment in cases involving child abuse and neglect investigations in varied and inconsistent ways. Some courts examine the threshold issue of whether the search was unreasonable, while other courts presume a search is unreasonable and proceed to an examination of the exceptions to the warrant requirement. Some courts reject application of the Fourth Amendment's probable cause and warrant requirements to child abuse and neglect investigations and use a reasonableness standard in their place. Some courts have adopted the

special needs exception to the warrant requirement, while others have flatly rejected the special needs exception. The United States Supreme Court has not determined the important issues relating to application of the Fourth Amendment to child abuse and neglect investigations conducted by child protective services workers.

With millions of child abuse and neglect investigations being conducted annually, it is critical that child protective services workers receive judicial guidance to assure that the best interests of the children are protected, consistent with protection of individual rights under the Fourth Amendment. The United States Supreme Court should grant *certiorari* in this case to resolve the various splits and inconsistencies in the lower federal courts regarding application of the Fourth Amendment to child abuse and neglect investigations conducted by child protective services workers, including whether the special needs doctrine should be recognized as an exception to the Fourth Amendment's warrant requirement. The Supreme Court should also grant *certiorari* in this case to resolve important Fourth Amendment questions regarding child abuse and neglect investigations which, to date, have not but should be resolved by this Court.

B. Procedural History

The plaintiffs, Michael C., Cherita C. and Kimberly W., on behalf of their minor children, Ian W. and Alexis C., sued Petitioner child protective services worker Dana Gresbach, in her individual and official capacity, and Denise Revels Robinson and Helene Nelson, each

in their official capacity, under 42 U.S.C. § 1983. Plaintiffs claim Ms. Gresbach violated the children's right to be free from unreasonable searches and seizures under the Fourth Amendment and the plaintiffs' right to familial integrity under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Wisconsin Constitution.

The plaintiffs moved for partial summary judgment, asking the District Court to find that Ms. Gresbach violated Alexis and Ian's Fourth Amendment rights. The defendants moved for summary judgment on all issues. The District Court granted the plaintiffs' motion for partial summary judgment, finding that Ms. Gresbach violated Alexis and Ian's Fourth Amendment rights. The District Court denied the defendants' motion with regard to Ms. Gresbach, finding that there were no disputes as to material facts and that Ms. Gresbach was not entitled to qualified immunity. The District Court granted the defendants' motion for summary judgment with respect to all claims against Ms. Revels Robinson and Ms. Nelson, but denied the motion with respect to the Due Process claim against Ms. Gresbach without prejudice.

In finding that Ms. Gresbach was not entitled to qualified immunity, the District Court determined that, although Ms. Gresbach was given consent to "interview" Ian and Alexis, Ms. Gresbach lacked consent to visually inspect certain commonly-exposed areas of the children's bodies.

Ms. Gresbach obtained a stay in the District Court and appealed the denial of qualified immunity.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision, concluding, based upon *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), that Fourth Amendment law was clearly settled and that Ms. Gresbach was therefore not entitled to qualified immunity. Ms. Gresbach petitions the United States Supreme Court for a Writ of *Certiorari* to address the split in the circuits and the inconsistencies in the lower federal courts' application of the Fourth Amendment to child abuse and neglect investigations conducted by child protective services workers.

C. Statement of Facts

Dana Gresbach has been employed by the Bureau of Milwaukee Child Welfare ("BMCW") as an Initial Assessment Child welfare agent since 1998. BMCW trained Ms. Gresbach in interviewing children. (R. 35-2 at 10.) On average, Ms. Gresbach handles approximately twelve (12) child abuse cases per month. (R. 35-2 at 9.)

Ms. Gresbach is trained to act quickly following a referral. (R. 35-3 at 7.) About eighty percent (80%) of the cases she handles involve situations in which the parent is the alleged maltreater. (R. 35-2 at 9.) When the alleged maltreater is the primary caregiver or parent, Ms. Gresbach will try to meet with the children at school. (R. 35-2 at 10.) Ms. Gresbach was trained to try to meet with the child before contacting the parents because it minimizes the opportunity for the parents to coach the child to keep quiet, or to alter the child's version of what transpired. (R. 35-2 at 10.) In addition,

when one child is alleged to have been abused, it is the BMCW policy to meet with all the children in the family. (R. 35-2 at 10.)

On February 4, 2004, a member of the plaintiffs' family contacted BMCW to report child abuse. (R. 35-3 at 10.) The family member reported that on January 30, 2004, Ian W., age 8, (R. 35-7 at 2.), disclosed to her that on January 28, 2004, his stepfather hit him with a plastic stick. (R. 41 at 15.) "[T]he plastic stick is long and it has written on it how to hit a certain way to make a whoosh noise." (R. 41 at 15.) She further reported that "Ian had a welt on his left wrist." *Id.*

On February 5, 2004, Ms. Gresbach received and reviewed the child abuse report and referral for investigation. (R. 35-3 at 7.) In preparation for the investigation, Ms. Gresbach reviewed the family's child protective services history and met with Child Protective Services Manager, Rita Zappen, as she customarily does with each investigation. (R. 35-3 at 8; R. 35-4 at 7.) Also, before meeting with the children, Ms. Gresbach spoke with the family member who reported the abuse. (R. 35-3 at 11.) Ms. Gresbach's report concerning her conversation with the family member on February 5, 2004, indicates as follows:

> Ian told her that his stepfather, Michael [C], hit him with a plastic stick. She stated that she observed a welt on Ian's left wrist. Ms. Harris stated that the father has repeatedly told the mother and stepfather that the

> stepfather not touch Ian . . . Ian told his father that he does not feel safe in his mother's home.

(R. 41 at 13.)

On February 9, 2004, Ms. Gresbach went to the children's school to investigate the reported child abuse. (R. 35-3 at 10.) When she arrived, Ms. Gresbach identified herself to the school secretary as a child welfare agent from BMCW, and explained that she was there to see the children. (R. 35-3 at 12, 14.) The secretary paged the principal of the school, Cheryl Reetz ("Ms. Reetz"), indicating that a child welfare agent was there to see two children. (R. 35 at 5.) Ms. Gresbach met with Ms. Reetz and gave her her business card. She again stated that she was there to "see Ian and Alexis" (R. 35 at 6; R. 35-3 at 12) because she was "doing a child protection investigation." (R. 35-3 at 12.)

Ms. Reetz testified that throughout her interaction with Ms. Gresbach, Ms. Gresbach was pleasant and professional, and made no types of threats. (R. 35 at 7, 12.) When Ms. Reetz inquired about whether she needed to call the parents, Ms. Gresbach told her that that was not necessary. (R. 35 at 6.) Ms. Reetz thus assumed that if social services came to the school, they had the right to see the children. (R. 35 at 6.)

There was nothing that prevented Ms. Reetz from calling the parents, nor was there any reason that Ms. Reetz could not have told Ms. Gresbach that she was not going to let her interview the children. (R. 35 at 7.) Ms. Reetz never told Ms. Gresbach to leave,

she never told her "no," or did anything to limit the scope of Ms. Gresbach's requested abuse investigation. (R. 35-3 at 14.) Ms. Reetz believed that it was her decision as to whether she was going to call the parents or not. (R. 35 at 11.)

Rather than limit the investigation, Ms. Reetz went to get Ian and told him there was someone in the office who wanted to see him. Ian did not object. (R. 35 at 6-7.) After Ms. Reetz got Ian, Ms. Reetz asked Ms. Gresbach if she needed to sit in. (R. 35 at 7.) Ms. Gresbach told her that they generally interview in private. (R. 35 at 6; R. 35-3 at 13.) Ms. Reetz brought Ian into the principal's office and left. (R. 35 at 7).

During Ms. Gresbach's meeting with Ian, Ms. Gresbach asked Ian about spankings and if he had any welts. (R. 35-7 at 11.) Ian said that when he's bad, his parents yell at him and his stepfather will hit him with a three-foot long flexible stick used just for hitting. (R. 41 at 12; 35-4 at 4.) Ian stated he had a red mark on his left wrist, but it is now gone. (R. 41 at 12). He showed his wrist to Ms. Gresbach, stating, "see?" (R. 35-4 at 5.) Ms. Gresbach asked if he had other marks. (R. 35-4 at 5.) Ian said yes, and stated that at one point, he had sustained a bruise to his forehead. (R. 35-4 at 5.) He said the bruise on his forehead was from when his stepfather hit him in the back of the head, causing him to hit his forehead on the kitchen table. (R. 41 at 12.) Ian added that his stepfather also hits his stepsister Alexis with the stick, and that his mother uses it too when she wants to give Alexis a "whooping." (R. 35-4 at 4.)

After hearing Ian's complaints about being whipped and beaten, Ms. Gresbach checked him for injuries on his arms, back, chest and legs. (R. 35-4 at 5.) Ms. Gresbach saw no injuries. (R. 35-4 at 5.)

Ian did not recall feeling uncomfortable or scared during the meeting with Ms. Gresbach. (R. 35-7 at 11.) Ian did not feel that he had done anything wrong while he was talking with Ms. Gresbach, nor did she tell him that he had done anything wrong. (R. 35-7 at 12.)

When Ian came out of the meeting, Ms. Reetz did not observe anything unusual about his demeanor, nor did he express that he experienced anything negative or appear distraught in any way. (R. 35 at 7.) As far as he recalls, Ian returned to his classroom without talking to anyone about his meeting with Ms. Gresbach. (R. 35-7 at 12.)

Ms. Reetz then brought Ian's stepsister, Alexis, into the room. Ms. Reetz told Alexis that there was someone in the office who wanted to see her. Alexis, age 9, (R. 35-6 at 1), had no reaction. (R. 35 at 7.) During the meeting, Ms. Gresbach asked standard questions. (R. 35-4 at 7.) Alexis told Ms. Gresbach that she also receives "whoopings" from both her father and her stepmother. (R. 41 at 12; 35-4 at 8.) Although Alexis denied having any marks, she complained that it "really hurts." (R. 41 at 12.)

Ms. Gresbach checked Alexis for injuries. (R 35-4 at 8.) Ms. Gresbach did not observe any private areas of Alexis' body. (R. 35-4 at 8.) Ms. Gresbach does not specifically recall where she checked for injuries and

could not specifically recall asking Alexis to pull down her tights, as is alleged in the Complaint. (R. 35-4 at 8.) Afterwards, Ms. Reetz took Alexis back to the classroom and Alexis did not appear the least bit distraught. (R. 35 at 7.)

Ms. Gresbach testified that each exam took about 5-10 minutes. (R. 35-4 at 7.)

Twelve experienced child welfare agents and managers submitted affidavits asserting that Ms. Gresbach's actions were sound and that, based on their training and experience, and based on the circumstances Ms. Gresbach encountered, if they had been in the position of Ms. Gresbach, they too would have believed that Ms. Reetz had consented to the entirety of Ms. Gresbach's investigation. (R. 23-34.)

During Federal Fiscal Year (FFY) 2006, an estimated 3.6 million referrals for child abuse and neglect, involving approximately 6 million children, were made to child protective service agencies. (Administration for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Maltreatment* (2006)). Of these investigations, 1,907,264 resulted in a disposition. (*Id.*) In more than twenty five percent (25%) of the investigations that reached the report stage, at least one child was found to have been a victim of child abuse or neglect. (*Id.*) An estimated 905,000 children, in FFY 2006 were victims of maltreatment. (*Id.*) A report of child abuse is made every 10 seconds. (*Id.*) It is estimated that the actual number of incidents of abuse and neglect is three times greater than reported. (*Id.*) Fifteen

hundred children die each year from child abuse and neglect. (*Id.*) Seventy-nine percent of the children killed are younger than four years of age. (*Id.*)

D. Jurisdiction of the District Court and Court of Appeals.

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 in that the present action arises under 42 U.S.C. § 1983. The United States Court of Appeals for the Seventh Circuit had jurisdiction to hear the appeal under 28 U.S.C. § 1291 in that denials of motions for summary judgment based upon qualified immunity are immediately appealable as final judgments under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons Relied on for Granting The Writ

Incidents of child abuse and neglect occur every 10 seconds in America. Federal, State and local laws are designed to protect children from such abuse and neglect. A critical component of these laws is the reporting and timely investigation of reports of abuse and neglect. Municipalities in every State use either employees or independent contractors to promptly investigate reports of abuse and neglect. Such investigations necessarily involve interviews of the alleged child abuse victims and often include visual examinations of the children for signs of abuse. Lower federal courts have been inconsistent in their application of the Fourth Amendment to

searches incident to a child abuse investigation conducted by non-law enforcement personnel, i.e., protective services workers. The United States Supreme Court has not addressed this important issue.

The present case involves a fairly routine child abuse investigation where Petitioner Dana Gresbach, a trained child abuse investigator, interviewed Respondent children at their private school with the knowledge and consent of the school's principal. When the children, during an interview with Ms. Gresbach, confirmed that they had been beat with a three-foot plastic stick, Ms. Gresbach conducted a visual examination of non-private areas of the children's bodies. The children did not object to the brief examination. Respondents do not challenge under the Fourth Amendment the interviews of the children, or the presence of Ms. Gresbach on school property. Respondents claim that the brief visual examinations were unreasonable searches in violation of the Fourth Amendment. Respondents further claim that probable cause did not exist for the examinations and that Ms. Gresbach needed, but did not have, a warrant that would allow examination of the children. Respondents also contend that the examinations of Ian and Alexis did not fit within any of the recognized exceptions to the warrant requirement. Finally, Respondents contend that the law regarding such searches was clearly established such that Ms. Gresbach was not entitled to qualified immunity from liability or suit.

The United States District Court for the Eastern District of Wisconsin concluded that Ms. Gresbach's brief examination of non-private areas of the children's

bodies incident to the abuse investigation was an unreasonable search in violation of the Fourth Amendment and that none of the exceptions to the warrant requirement, including the special needs exception, applied. The United States Court of Appeals for the Seventh Circuit affirmed.

Petitioner seeks *certiorari* review of the District Court's denial of qualified immunity to Ms. Gresbach and the Seventh Circuit's affirmance of that decision. The Seventh Circuit, in affirming the denial of qualified immunity, followed its decision in *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), where the court ruled that the Fourth Amendment was violated during the course of a child abuse investigation, but then concluded that the child protective services worker was entitled to qualified immunity. As a result of the qualified immunity decision, the *Heck* court's determination of the novel Fourth Amendment issues was unreviewable. The Court of Appeals in the present case then applied the *Heck* decision to conclude that the law was clearly established that the Fourth Amendment prohibited the brief examination of the children. The Seventh Circuit's use in this case of the two-part qualified immunity analysis adopted by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2152 (2001) raises the same issue raised in *Pearson v. Callahan*, No. 07-751 (U.S. S.Ct. filed Dec. 4, 2007) (cert granted March 24, 2008), i.e., a lower court, in performing the qualified immunity analysis, can decide an important constitutional issue, but then find that the constitutional right was not clearly established, resulting in the decision on the merits of the constitutional issue being unreviewable.

It is well-established that a search violates the Fourth Amendment only when the search is **unreasonable**. Although Petitioner does not challenge that the visual examination of non-private areas of a child's body during the course of a child abuse investigation was a search, such an examination was not **unreasonable** and, therefore, not a violation of the Fourth Amendment. The examination of Ian and Alexis was limited to a visual examination and involved no touching. The examination was of non-private areas of the children's bodies. The examination did not involve a strip search or a genital examination. Ms. Gresbach's examination was of areas that would be visible if the children were simply in bathing suits. Ms. Gresbach did not examine any areas of the children's bodies until after Ian confirmed to Ms. Gresbach that his stepfather had struck him with a three-foot plastic stick. The children did not object to Ms. Gresbach's requests to view the non private areas of their bodies. Under the circumstances, such an examination is not an unreasonable search in violation of the Fourth Amendment.

Lower federal courts have differed on whether the "unreasonableness" inquiry is a threshold issue or whether such a search is presumed to be unreasonable, subject to further analysis under the exceptions to the warrant requirement. The United States Supreme Court should grant review to determine the important federal constitutional issue of whether a child protective services worker's limited search of non-private areas of a child's body, incident to a child abuse investigation, is an unreasonable search in violation of the Fourth Amendment and whether lower courts must consider the "unreasonableness" question as a threshold issue.

The District Court and Court of Appeals concluded that Ms. Gresbach needed probable cause to believe child abuse had occurred and that she required a warrant to perform the brief examination of the children's bodies, absent an exception to the warrant requirement. The United States Court of Appeals for the Seventh Circuit in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), concluded that probable cause and the warrant requirement did not apply in the context of a visual inspection of areas of a child's body as part of a child abuse investigation at a public school. In *Heck* and the present case, the Seventh Circuit distinguished *Darryl H.* based on the location of the examination, i.e., a private school rather than a public school. Absent First Amendment free exercise of religion issues, which are not present in this case, this distinction between public and private schools is irrelevant to the question of whether probable cause or a reasonableness standard should be applicable to Fourth Amendment searches in the context of child abuse investigations. If the child protective services worker is properly on the school premises, then the location of where the search occurs (public vs. private school) is meaningless.

The reasonableness standard, rather than the requirements of probable cause and a warrant, better fits non-criminal child abuse investigations by child protective services workers. Lower federal courts are split on whether the Fourth Amendment's probable cause and warrant requirements apply in child abuse and neglect investigations by child protective services workers. The Supreme Court should grant review to consider the important Fourth Amendment issue of whether a reasonableness standard or the requirements

of probable cause and a warrant apply in the context of a child abuse investigation which does not involve law enforcement where the child protective services worker examines non-private areas of a child's body after the child confirms that a suspected abuser has engaged in child abuse or neglect.

This Court has recognized several exceptions to the Fourth Amendment's warrant requirement, including consent and exigent circumstances. Lower courts are split on whether the "special needs doctrine" is also applicable as an exception to the warrant requirement in child abuse investigations not involving law enforcement. The Supreme Court has applied the special needs doctrine in a variety of other analogous civil and administrative contexts. The Supreme Court should grant *certiorari* review to settle the conflict in the lower courts as to whether the special needs doctrine applies as an exception to the Fourth Amendment's warrant requirement in non-law enforcement investigations of child abuse.

The present case arises out of the denial of qualified immunity. The Court can resolve the qualified immunity inquiry under the first step of the two-step analysis set forth by the Supreme Court in *Saucier*, i.e., whether the alleged conduct violated the Fourth Amendment. Alternatively, the Court should grant the Petition for Writ of *Certiorari* to determine if Fourth Amendment law was clearly established such that a reasonable child protective services worker would have known that her brief visual examination of non private areas of the children's bodies, after the children confirmed that their parents struck them with a three-foot plastic stick,

violated the Fourth Amendment. These issues confront child protective services workers on a daily basis in every State in the country. This Court's decision would provide guidance to such workers.

B. Lower Federal Courts Are Split On Whether Courts Must Initially Address The Fourth Amendment's Threshold Question of "Unreasonableness" When Analyzing A Child Protective Services Worker's Visual Examination Of Non Private Areas Of A Child's Body Incident To A Child Abuse and Neglect Investigation.

By definition, the Fourth Amendment only prohibits unreasonable searches. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). A search is reasonable under the Fourth Amendment "as long as the circumstances, viewed objectively, justify [the government's] action." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 1948 (2006). To determine objective reasonableness under the Fourth Amendment, courts balance "the degree to which [the search] intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). This is a context driven inquiry:

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires

> "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's needs for effective methods to deal with breaches of the public order.

New Jersey v. T.L.O., 469 U.S. 325, 333 (1985)

Despite this fundamental principal, the application of the Fourth Amendment to investigations of child abuse by State child protective services workers has resulted in uncertain and conflicting law that requires clarification. The First and Fourth Circuits have analyzed such an investigation under a pure "reasonableness" approach that balances the degree of the intrusion against the weight of the governmental interest. *See Wojcik v. Town of N. Smithfield*, 76 F.3d 1, 3 (1st Cir. 1996); *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993). In contrast, the Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have collapsed the reasonableness test into the exceptions to the Fourth Amendment's warrant requirement, holding that a search or seizure incident to such an investigation is presumptively unreasonable unless the investigator has a warrant, probable cause, exigent circumstances or, in some cases, "special needs." *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999); *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1093 (3d Cir. 1989); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395 (5th Cir. 2002); *Heck*, 327 F.3d 492 (7th Cir. 2003); *Calabretta v. Yolo County Dep't of Soc. Servs.*, 189 F.3d 808 (9th Cir. 1999); *Dubbs*

v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003). Because each approach can invite different results under similar facts, this Court is in a position to restore balance to an important question of law and declare, as a fundamental matter, that it is objectively reasonable under the Fourth Amendment for a child protective services worker to conduct a warrantless, visual search of the non-private areas of a minor child during an investigation by a child protective services worker of alleged physical child abuse.

Under the reasonableness test, the first factor for consideration is the nature of the privacy interest that the search intrudes upon. *See T.L.O.* at 469 U.S. at 333. In this regard, the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *Id.* at 338. While children may have a reasonable expectation of privacy in the public or private school setting, that expectation must be tempered by the realities of the school environment. *See Veronia Sch. Dist. 47J*, 515 U.S. at 656-57 (students within the school environment have a lesser expectation of privacy than the general population). This is particularly true where, as here, a child protective services worker conducts only a visual search of non-private, commonly exposed areas of a child's body, such as a leg or an arm, implicating only the most minimal intrusion into the student's privacy interests. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989) (collecting urine samples "intrudes upon an excretory function traditionally shielded by great privacy"). Under these circumstances, the nature of the privacy interest and the governmental intrusion into that interest is minimal.

In contrast, the nature and immediacy of the governmental interest in protecting children against physical abuse is significant. As this Court has recognized, when it comes to the welfare of our children, "[t]here is no more worthy object of the public's concern." *Wyman v. James*, 400 U.S. 309, 318 (1971), *See also Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000) (noting "the state's compelling interest in protecting children from abuse and neglect.") That interest is strengthened when the child confirms, during the investigation, that he or she has been abused. When that occurs, as it did here, it is not unreasonable for the State to conduct a visual inspection of the child's non-private areas to determine whether child abuse has occurred.

Unfortunately, lower federal courts have not reached a consensus on the legal standard that applies to this important question of federal law. As a result, the law is unclear, leaving open the real possibility that two similarly situated courts will reach different conclusions on this most basic question under an identical set of facts. For this reason, the Court is asked to accept *certiorari* review to decide a question of fundamental importance and to establish a uniform standard regarding the application of the Fourth Amendment to investigations by child protective services workers of alleged child maltreatment.

C. Lower Federal Courts Are Split On Whether A Reasonableness Standard Or The Fourth Amendment's Probable Cause And Warrant Requirements Should Apply To A Child Protective Services Worker's Visual Examination Of Non Private Areas Of A Child's Body Incident To A Child Abuse and Neglect Investigation.

Decisions of lower federal courts are split on whether the traditional requirements of probable cause and a warrant apply to searches incident to a child abuse investigation by a child protective services worker. In fact, there is a split within the Seventh Circuit on this issue based upon the location of the search. The Seventh Circuit, in *Darryl H.*, adopted a reasonableness standard, rather than requiring probable cause and a warrant, for visual inspections of body areas of children during the course of a child abuse investigation which occurs at a public school. In *Heck*, 327 F.3d 492, the Seventh Circuit rejected the reasonableness standard and, instead, ruled that probable cause and a warrant were required where the search occurred at a private school. As noted above, there is no logical reason for distinguishing searches at private schools from those at public schools where the worker is properly on the premises.

Other federal courts are split, as well, on this question. In *Wildauer*, a foster parent sued a county social worker claiming violation of the Fourth Amendment resulting from a search and examination of children. *Id.*, 993 F.2d at 369. The trial court and court of appeals concluded that the State's interest in examining neglected children outweighed any

attenuated privacy interests of the plaintiff, citing to the Seventh Circuit decision in *Darryl H. Wildauer*, 993 F.2d at 373. The Fourth Circuit observed, "We cannot say that the Constitution requires that a visual inspection of the body of a child who may have been the victim of child abuse can only be undertaken when the standards of probable cause or a warrant are met." *Wildauer*, 993 F.2d at 373.

In *Roe*, the United States Court of Appeals for the Fifth Circuit reached a contrary decision, ruling that a visual body cavity search of a child without probable cause and a warrant violated the Fourth Amendment. The *Roe* court observed:

> We have not addressed which Fourth Amendment test should apply to a social worker's visual search of a child's body cavities, and the other courts of appeals are divided. The Seventh Circuit has held that a child protective services worker need only satisfy the lesser special needs test and not the more rigorous probable cause requirement. The Third, Ninth and Tenth Circuits have rejected the Seventh Circuit's approach and apply instead the traditional Fourth Amendment standard to juvenile strip searches. The Second Circuit has taken an intermediate position: even if social workers need not satisfy the probable cause and warrant requirements in all cases, they must obtain prior judicial approval when doing so would not threaten the child's well-being.

Roe, 299 F.3d at 403.

In *Dubbs*, the parents alleged a Fourth Amendment violation after their children were subjected to physical examination by county health department nurses. *Dubbs*, 336 F.3d at 1194. The Tenth Circuit ruled that the physical examinations were unconstitutional unless performed with a warrant, parental consent or otherwise fell within the special needs exception to the warrant requirement. *Id.* at 1207.

Lower federal courts have taken differing and inconsistent approaches as to the appropriate standard to apply under the Fourth Amendment for visual inspections of a child's body by a child protective services worker during a child abuse investigation. The United States Supreme Court should grant Ms. Gresbach's Petition for Writ of *certiorari* to resolve the split in the circuits and to provide guidance to child protective services workers who annually perform millions of child abuse and neglect investigations.

D. Lower Federal Courts Are Split On Whether The Special Needs Doctrine Is An Exception To The Fourth Amendment's Warrant Requirement In Child Abuse And Neglect Investigations By A Child Protective Services Worker.

The United States Supreme Court has recognized that, in certain circumstances, the special needs doctrine is an exception to the Fourth Amendment's warrant requirement. *Board of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding as constitutional the suspicionless and warrantless drug testing of public high school students involved in extracurricular activities); *Veronia Sch. Dist. 47J*, 515 U.S. 646 (upholding a warrantless random drug

testing program of high school athletes due to the compelling need to combat drug use among students); *T.L.O.*, 469 U.S. 325 (upholding the constitutionality of a warrantless search based on reasonable suspicion of a high school student due to the special need for discipline in schools); *Skinner*, 489 U.S. 602 (upholding the constitutionality of the Federal Railroad Administration's regulations for alcohol and drug testing of railroad employees in part due to the industry being highly regulated); *United States v. Biswell*, 406 U.S. 311 (1972) (upholding provisions of the Gun Control Act of 1968 authorizing warrantless searches of gun stores because such store owners are engaged in a highly regulated industry). The Supreme Court in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), in discussing the special needs doctrine, reiterated that the justification for the absence of a warrant must be divorced from the State's general interest in law enforcement. *Id.* at 79.

Federal courts of appeals are divided as to whether child abuse investigations by a child protective services worker come within the special needs exception. The Supreme Court has yet to consider this issue. The First and Fourth Circuits have suggested the applicability of the special needs exception in some child abuse and neglect investigation circumstances. *Wojcik v. Town of N. Smithfield*, 76 F.3d 1 (1st Cir. 1996); *Wildauer*, 993 F.2d 369 (4th Cir. 1993). Other courts of appeals have either categorically rejected or suggested that they would reject applicability of the special needs exception in the child abuse investigation context. *Roe*, 299 F.3d 395 (5th Cir. 2002); *Heck*, 327 F.3d 492 (7th Cir. 2003); *Dubbs*, 336 F.3d 1194 (10th Cir. 2003); *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993).

The United States Supreme Court has not, to date, addressed the applicability of the special needs exception in the context of child abuse investigations by child protective services workers. As noted above, in 2006, there were 3.6 million referrals where child protective services workers were charged with investigating child abuse or neglect. Such investigations routinely involve interviews of children suspected of being abused and may include examination of areas of the children's bodies for signs of physical abuse. Supreme Court resolution of this conflict in the circuits would provide important guidance to child protective services workers around the country in conducting the millions of investigations performed annually.

The special needs exception is compatible with the needs of child protective services workers to investigate alleged abuse and is consistent with this Court's application of the exception in other contexts. Searches pursuant to this exception would be limited to what would be reasonable under the circumstances, which certainly would include observations of non-private areas of children's bodies, particularly where, as in the present case, there is no objection from the children and the children confirm the abuse being investigated. The special needs exception would allow child protective services workers to do their job without the fear of lawsuits. This exception would also permit workers to conduct thorough investigations and to not discontinue an investigation where the worker reasonably believes that the child may have been the subject of abuse but probable cause, as applied in criminal cases, may not be

present.[1] Adoption of the special needs exception also serves the important interests of the children involved by protecting them from further harm at the hands of the abusive individual. Moreover, adoption of the special needs exception furthers the State's *loco parentis* interests in the protection of children.

The Supreme Court should grant Ms. Gresbach's petition for a writ of *certiorari* to resolve the conflict the lower federal courts on the applicability of the special needs exception to child abuse and neglect investigations by child protective services workers. Additionally, the Court should grant Ms. Gresbach's petition for a writ of *certiorari* in order to decide the important Fourth Amendment question regarding the applicability of the special needs exception to searches incident to a child abuse investigation. This Court has not but should decide this important constitutional question in order to provide guidance to child protective services workers who conduct more than three million abuse and neglect investigations annually.

E. The Law Was Not Clearly Settled That A Child Protective Services Worker's Visual Examination Of Non Private Areas Of A Child's Body Incident To A Child Abuse And Neglect Investigation Violated The Fourth Amendment.

The District Court denied Ms. Gresbach's motion for summary judgment on qualified immunity grounds and the United States Court of Appeals for the Seventh

---

[1] Petitioner, in fact, believes that probable cause did exist for the brief examinations of the non-private areas of Ian and Alexis' bodies; however, this issue was not briefed below.

Circuit affirmed. Unquestionably, the law governing child abuse and neglect investigations under the Fourth Amendment, as discussed above, was, and remains, unsettled. There are conflicts in lower federal court decisions in nearly all areas involving applicability of the Fourth Amendment to child abuse and neglect investigations conducted by child protective services workers, including conflicts in the applicability of the special needs exception to the warrant requirement.

Courts engage in a two-part inquiry in civil rights actions brought pursuant to 42 U.S.C. § 1983 to determine whether a defendant is entitled to qualified immunity from suit and liability. *Saucier*, 533 U.S. 194. When qualified immunity is asserted as a defense, a court will first determine whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right. *Saucier*, 533 U.S. at 200 01. If so, the next step is to ask whether the right was clearly established at the time the conduct occurred. *Id.* The defendant will enjoy qualified immunity unless the court affirmatively answers both of these questions. *Id.*

When a defendant asserts qualified immunity as a defense, one critical issue is whether the defendant official violated federal law that was clearly established at the time he or she acted. *Saucier*, 533 U.S. at 207; *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). The *Harlow* test is an objective reasonableness test. 457 U.S. at 818. This test has been described as a "fair warning standard"; if the federal law is clearly established, the official is considered to be on notice that

violation of the law may result in civil liability. *United States v. Lanier*, 520 U.S. 259, 270-71, 117 S.Ct. 1219 (1997).

Under the qualified immunity test, the violation of the right at issue must be clearly established in a particularized sense. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. This does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.*

The law governing the applicability of the Fourth Amendment to child abuse and neglect investigations by child protective services workers remains unsettled. In *Kia P.*, the Second Circuit observed:

> In *Tenenbaum*, we declined to decide which of the three modes of determining whether a seizure was 'reasonable' under the Fourth Amendment should apply in cases where the State seizes a child in order to prevent abuse or neglect. Whether such a seizure requires probable cause, or whether it is subject to a 'less stringent reasonableness requirement' due to the 'special needs' of child protection agencies, or whether a seizure must be justified by 'exigent circumstances' was unnecessary to our decision because the three analyses supported our holding that a jury

> could have concluded that a seizure in that case was unconstitutional. * * * We need not and therefore do not address the issue in this case either.

Kia P., 235 F.3d at 762. In *Roe*, the Fifth Circuit commented:

> We have not addressed which Fourth Amendment test should apply to a social worker's visual search of a child's body cavities, and the other courts of appeals are divided. The Seventh Circuit has held that a child protective services worker need only satisfy the lesser special needs test and not the more rigorous probable cause requirement. The Third, Ninth, and Tenth Circuits have rejected the Seventh Circuit's approach and apply instead the traditional Fourth Amendment standard to juvenile strip searches. The Second Circuit has taken an intermediate position: Even if social workers need not satisfy the probable cause and warrant requirement in all cases, they must obtain prior judicial approval when doing so would not threaten the child's well-being. To take sides in this inter-circuit conflict, we focus on Supreme Court precedent establishing the "special needs" doctrine;

Roe, 295 F.3d at 444. *See also*, *Calabretta*, 189 F.3d at 815 (Noting a conflict among the circuits on application of the Fourth Amendment to searches incident to a child abuse and neglect investigation).

As a number of federal circuit courts of appeals have observed, lower federal courts are divided on the standards that apply to searches by child protective services workers during child abuse and neglect investigations. Many of the conflicts have been discussed in earlier portions of the present petition and will not be repeated here. The law was not clearly established in 2004 such that a reasonable child protective services worker would have understood, under the particularized circumstances confronting her, that a brief examination of non-private body parts of two children, after the children confirmed the report that their parents had struck them with a three-foot plastic stick and where the children did not object to the examination, violated the children's Fourth Amendment rights.

CONCLUSION

The United States Supreme Court should grant Ms. Gresbach's petition for a writ of *certiorari* to resolve the conflicts in the circuits regarding applicability of the Fourth Amendment to child abuse and neglect investigations by child protective services workers where the worker, incident to the investigation, examines non-private areas of the child's body. Additionally, the Supreme Court should grant Ms. Gresbach's Petition for Writ of *Certiorari* to resolve the important Fourth Amendment questions that arise daily in child abuse investigations but have not yet been, but should be, addressed by this Court.

Respectfully submitted,

MICHAEL J. MODL
Counsel of Record
BRIAN C. HOUGH
AXLEY BRYNELSON, LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 – fax
mmodl@axley.com
bhough@axley.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-1756

MICHAEL C., CHERITA C., KIMBERLY W., ET AL.,

Plaintiffs-Appellees,

v.

DANA GRESBACH,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 05 C 650—**Lynn Adelman,** *Judge.*

ARGUED DECEMBER 3, 2007—DECIDED MAY 19, 2008

Before BAUER, EVANS AND SYKES, *Circuit Judges.*

BAUER, *Circuit Judge.* The parents and stepparents of minor children Ian and Alexis ("Plaintiffs") sued Dana Gresbach, a caseworker with the Bureau of Milwaukee Child Welfare ("Bureau"), under 42 U.S.C. § 1983, alleging in part that Gresbach violated the children's

Fourth Amendment rights when she conducted under-the-clothes examinations of each child's body during separate interviews at their private school, as part of a child abuse investigation in February of 2004. Gresbach moved for summary judgment on qualified immunity grounds. The district court denied the motion, holding that Gresbach's conduct violated the children's rights to be free from unreasonable searches, and those rights were clearly established at the time of the searches. Gresbach appeals, arguing that she is entitled to qualified immunity because her actions were objectively reasonable under the Fourth Amendment after she received general consent from the school's principal to investigate an allegation of child abuse pursuant to Wis. Stat. § 48.981(3)(c)1, and no case clearly established that her investigation violated the children's Fourth Amendment rights. We affirm.

I.

In *Doe v. Heck,* 327 F.3d 492 (7th Cir.2003), we addressed the application of the Fourth Amendment in the context of child abuse investigations by the same state agency at issue here, the Bureau, on the premises of a private school. Because we find *Heck* to be a blueprint for our analysis, a brief review of its facts and holding, as they pertain to this case, is necessary.

The Bureau, a division of the Wisconsin Department of Health and Family Services which provides child abuse prevention and related services in Milwaukee County, conducts investigations of child abuse

allegations under established protocols in order to substantiate whether or not child abuse has occurred. Prior to April, 2003, Wis. Stat. § 48.981(3)(c)1[1] had been interpreted as providing Bureau caseworkers with the authority to interview children at school without having to obtain permission from their parents or school officials. *See Heck*, 327 F.3d at 502 n. 6. In *Heck*, Bureau caseworkers received a report that a child had been spanked at his private school, which followed a corporal punishment policy. Pursuant to their investigation, the caseworkers went to the school, identified themselves to the principal, and requested to see the child for an interview. The principal initially refused to allow the workers to interview the child, however once the workers received confirmation from a Wisconsin district attorney that § 48.981(3)(c)1 gave them the authority to interview children on school premises without obtaining consent from either the parents or school officials, the principal reluctantly agreed to allow the caseworkers to interview the child, which they did, without conducting a physical examination of the child. Later, the school and the child's parents sued the caseworkers, alleging in part that they conducted an unreasonable search of the school premises and an

---

1. Section 48.981(3)(c)1 provides, in pertinent part, that "[t]he agency may contact, observe or interview the child at any location without permission from the child's parent, guardian, or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child's dwelling only with permission from the child's parent, guardian, or legal custodian or after obtaining a court order."

illegal seizure of the child in violation of the Fourth Amendment. The district court found that the caseworkers were protected by qualified immunity, and we affirmed.

Under established Fourth Amendment principles, we found that a private school and its students had a reasonable expectation of privacy in and within the school's premises, and that therefore the caseworkers' warrantless search of the premises and seizure of the child in order to conduct an interview for a child abuse investigation, without the consent of the child's parents or school officials, was presumptively unreasonable. *Heck*, 327 F.3d at 510-13. We determined, in part, that "to the extent § 48.981(3)(c)1 authorizes government officials to interview children suspected of being abused on private property without a warrant or probable cause, consent, or exigent circumstances, it is clearly unconstitutional as applied." *Id.* at 515-16. We nevertheless found that a reasonable child welfare caseworker would not have understood his actions under the statute to be unconstitutional under the Fourth Amendment at the time of the alleged violation, because his conduct did not violate any clearly established law. Accordingly, we held that the caseworkers were entitled to qualified immunity, but stated that "[a]t this juncture [April, 2003] . . . we now make it clear that it is patently unconstitutional for governmental officials to search the premises of a private or parochial school and/or seize a child attending that school without a warrant or court order, probable cause, consent, or exigent circumstances." *Heck*, 327 F.3d at 517.

Appendix A

It is through the lens of *Heck* that we examine the district court's conclusion that Gresbach is not entitled to qualified immunity.

II.

On February 4, 2004, a female family member of eight-year-old Ian made a child abuse report to the Bureau, stating that Ian told her that Michael C., Ian's stepfather, hit him on the wrists with a plastic stick on January 28, 2004. On February 5th, Dana Gresbach, an agent with the Bureau since 1998, was assigned the case. During the next four days, Gresbach reviewed the child abuse report, met with a manager at the Bureau, Rita Zappen, and spoke to the family member who reported the abuse. On February 9th, Gresbach went to Ian's private school, Good Hope Christian Academy ("Good Hope"), to interview Ian and his stepsister, nine-year-old Alexis.

When Gresbach arrived at Good Hope, she met with Principal Cheryl Reetz. Gresbach handed Reetz her business card and told Reetz that she needed to see Ian and Alexis. Reetz was unfamiliar with her own role in a child abuse investigation—the only real training she had received was annual review of the faculty handbook, which delineates a teacher's responsibilities as a mandatory reporter of child abuse. Reetz asked Gresbach if she could call the children's parents, to which Gresbach said no, and that Gresbach would contact the parents herself after she had spoken with Ian and Alexis. Reetz also asked Gresbach if she could observe

the interviews, and Gresbach responded that Reetz need not do so. According to Reetz, she was concerned about allowing Gresbach to interview the children without parental consent, but she assumed that because Gresbach was a Bureau caseworker, Reetz was legally obligated to allow Gresbach to see the children, and that she was legally prohibited from contacting the children's parents. Gresbach did not ask permission from Reetz to physically examine Ian and Alexis for signs of abuse; she believed she was not obliged to do so, because § 48.981(3)(c)1 gave her the authority to conduct an interview and possible physical examination of the children without consent. Under *Heck*, Gresbach's belief was inaccurate.

Reetz allowed Gresbach to use her office to conduct the interviews, and she retrieved the children from their classrooms. Gresbach spent ten to fifteen minutes alone in the office with each child. Ian told Gresbach that Michael C. sometimes hit him with a flexible stick. Gresbach examined Ian's wrist for injuries, but did not see any. Gresbach asked the child to pull up his shirt, and Ian complied. Gresbach inspected his back for suspicious injuries, but found none. During her interview, Alexis told Gresbach that her parents sometimes gave her "whoppings," but denied receiving any marks or injuries. Gresbach asked Alexis to pull down her tights and lift up her dress, and Alexis did so. Gresbach examined her legs for any injuries, and found none. Gresbach finished the interviews and left the school.

Gresbach later spoke with the children's mother, who was very upset about what had happened at the school. The Bureau made attempts to meet with the parents and step-parents of Ian and Alexis, but the meetings never occurred. Because no injuries were observed on the children, the Bureau eventually closed the case.

On June 15, 2005, Plaintiffs (individually and on behalf of their minor children, Alexis and Ian) sued Gresbach, individually and in her official capacity, and Denise Revels Robinson (the Bureau's director) and Helene Nelson (the Bureau's secretary) in their official capacities. Plaintiffs alleged that the defendants (1) subjected each child to an unreasonable search and seizure at their private school, in violation of the Fourth Amendment; (2) violated all of the Plaintiffs' rights to familial relations under the Fourteenth Amendment; and (3) violated all of the Plaintiffs's rights to procedural due process under the Fourteenth Amendment. Plaintiffs also challenged the constitutionality of Wis. Stat. § 48.981(3)(c)1 as applied, sought an injunction against defendants to prohibit enforcement of the statute in a manner inconsistent with Plaintiffs' constitutional rights and to direct defendants to amend their procedures and personnel training, and requested a declaration that the last sentence of § 48.981(3)(c)1 was unconstitutional. The defendants responded that their conduct did not violate any clearly established constitutional rights, and that therefore they were protected by qualified immunity. Both parties moved for summary judgment.

Appendix A

On March 19, 2007, the district court granted partial summary judgment in favor of the Plaintiffs, finding that Gresbach violated the children's Fourth Amendment rights to be free from unreasonable searches and seizures. The court held that while Gresbach obtained voluntary consent from Reetz to conduct interviews of the children, Gresbach did not have consent to conduct the searches of the children's bodies, thus violating their rights to be free from unreasonable searches. The court further found that those rights were clearly established at the time of the alleged violation under *Heck*, in that a reasonable child welfare worker would have known that she lacked authority to conduct such a search. Accordingly, the court denied Gresbach's motion for summary judgment under qualified immunity.[2]

III.

We review a district court's denial of summary judgment on qualified immunity grounds *de novo*. *Sallenger v. Oakes*, 473 F.3d 731, 739 (7th Cir.2007). We will affirm the district court's judgment if we find that a plaintiff "present[ed] a version of the facts that is supported by the evidence and under which defendants would not be entitled to qualified immunity." *Borello v. Allison*, 446 F.3d 742, 746 (7th Cir.2006) (citation

2. The district court dismissed all of Plaintiffs' claims for equitable relief, which included all claims against Robinson and Nelson, as well as supplemental state law claims-none of which are issues before us today. The court further denied defendants' motion for summary judgment on Plaintiffs' due process claims without prejudice, and granted a stay, pending this appeal.

omitted). Under the qualified immunity analysis, an official performing discretionary functions is immune from suit if her "conduct could reasonably have been thought consistent with the rights she is alleged to have violated." *Id.* (internal quotations omitted).

When evaluating a qualified immunity claim, we must first decide whether, taken in the light most favorable to the plaintiffs, the facts show that the official's conduct violated a constitutional right. *Finsel v. Cruppenink*, 326 F.3d 903, 906 (7th Cir.2003) (citing *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). "Only if the answer is affirmative does the court inquire whether the official enjoys qualified immunity." *Hosty v. Carter*, 412 F.3d 731, 733 (7th Cir.2005). If a constitutional violation could be made out on a favorable view of the parties' submissions, the next step is to ask whether the right was "clearly established." *Id.* To be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what she is doing violates that right. *Landstrom v. Illinois Dept. of Children and Family Services*, 892 F.2d 670, 675 (7th Cir.1990) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1986)). If the right was "clearly established," the official is not entitled to qualified immunity from suit.

Appendix A

A. Violation of a Constitutional Right

Our threshold inquiry is whether Gresbach violated Ian and Alexis's Fourth Amendment rights to be free from unreasonable searches. The Fourth Amendment, as applied to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their persons, homes, and effects, without a warrant supported by probable cause. *See* U.S. Const. amend. IV. The protections afforded by the Fourth Amendment apply not only to the activities of criminal authorities, but civil authorities as well, *New Jersey v. T.L.O.*, 469 U.S. 325, 335, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), including child welfare workers. *Heck*, 327 F.3d at 509; *Daryl H. v. Coler*, 801 F.2d 893, 900 (7th Cir.1986); *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1010 n. 4 (7th Cir.2000) (finding that the Fourth Amendment protects students from unreasonable searches and seizures by public school officials); *Jones v. Hunt*, 410 F.3d 1221, 1225 (10th Cir.2005) ("There is no 'social worker' exception to the Fourth Amendment.") (citation omitted); *Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d. Cir.1999) (holding the Fourth Amendment doctrine applies to searches and seizures made in the context of child abuse investigations).

First we determine whether Gresbach's conduct constituted a "search" within the meaning of the Fourth Amendment. "When the Fourth Amendment was ratified, as now, to 'search' meant 'to look over or through for the purpose of finding something; to explore;

to examine by inspection. . . .'" *Heck*, 327 F.3d at 510 (quoting *Kyllo v. United States*, 533 U.S. 27, 33 n. 1, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)); *see Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir.1995) (holding that observation of unclothed bodies is a form of a search under the Fourth Amendment). Within the context of child abuse investigations, physical examinations conducted by child welfare caseworkers, that include visual examinations of portions of a child's body which are normally covered by clothing, implicate Fourth Amendment concerns, and are within the scope of searches under the amendment. *Daryl H.*, 801 F.2d at 899-900. Thus, the visual observations of Ian's stomach and Alexis's legs by Gresbach to look for signs of abuse must be searches under the scope of the Fourth Amendment.

Of course, the Fourth Amendment prohibits only those searches that are unreasonable. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is reasonableness."); *Stanley v. Henson*, 337 F.3d 961, 964 (7th Cir.2003) ("Included within the Fourth Amendment's protection is the right to be free from unreasonable searches of one's unclothed body."). To determine reasonableness under the Fourth Amendment, we balance the degree of the intrusion on the individual's privacy interests against the government's need for the search. *Shell v. United States*, 448 F.3d 951, 956 (7th Cir.2006). "[W]hether a

search is 'reasonable,' in the constitutional sense, will vary according to the context of the search." *Daryl H.*, 801 F.2d at 900. Gresbach's searches of the children's bodies took place on private property, and *Heck* made clear that a warrantless search conducted on private property is presumptively unreasonable, whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory standards, so long as the person has a reasonable expectation of privacy in the premises on which the search took place. *Heck*, 327 F.3d at 511 (citations omitted).

A reasonable expectation of privacy is present for Fourth Amendment purposes when (1) one exhibits an actual or subjective expectation of privacy, and (2) that expectation is one that society is prepared to recognize as reasonable. *United States v. Amaral-Estrada*, 509 F.3d 820, 826 (7th Cir.2007). Even a limited search of a person is a substantial invasion of privacy. "A search of a child's person or of a closed purse or other bag carried on her person . . . is undoubtedly a severe violation of subjective expectation of privacy." *Daryl H.*, 801 F.2d at 900 (quoting *T.L.O.*, 469 U.S. at 330, 105 S.Ct. 733, 83 L.Ed.2d 720). However, it is unnecessary to show a subjective expectation of privacy in instances of searches or seizures of young children-it is more appropriate to consider whether the parents manifested a subjective expectation of privacy in the premises within which the search took place. *Heck*, 327 F.3d at 512. Private schools, by their very operation, exhibit a subjective expectation of privacy in their premises. *Id.* at 511. The Plaintiffs manifested a subjective

expectation of privacy by placing their children in Good Hope Academy, and entrusting their children to the care of the school's officials *in loco parentis. See id.*

Moreover, an expectation of privacy is objectively reasonable where parents who place their children in private schools expect that the parents' express delegation of parental authority to school officials will be both acknowledged and respected by government actors. *Heck,* 327 F.3d at 512. We find that Plaintiffs had a legitimate expectation of privacy at Good Hope, and therefore the searches of the children's bodies to investigate child abuse were presumptively unreasonable, unless they fall within an exception to the warrant requirement of the Fourth Amendment. *See id.* at 511.

Gresbach argues that it is objectively reasonable under the Fourth Amendment for a child welfare agent to visually inspect these areas of a child's body for injuries after receiving general consent from the child's private school principal to investigate child abuse. An established exception to the warrant requirement is a search conducted pursuant to consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Moore,* 375 F.3d 580, 585 (7th Cir.2004). We are aware that this exception is grudgingly granted because "the privacy interests protected by the Fourth Amendment are to be jealously guarded." *Heck,* 327 F.3d at 513 (quoting *Wilson v. Health & Hosp. Corp. of Marion County,* 620 F.2d 1201, 1209 (7th Cir.1980)). A consensual search is manifestly

reasonable under the Fourth Amendment as long as it remains within the scope of consent. *See Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). The scope of consent is "limited by the breadth of actual consent, and whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of all the circumstances." *United States v. Long*, 425 F.3d 482, 486 (7th Cir.2005) (citation omitted). "In determining the scope of a defendant's consent, we apply an objective standard: 'what would the typical reasonable person have understood by the exchange between the offic[ial] and the [consentor]?' " *Id.* (quoting *United States v. Raney*, 342 F.3d 551, 556 (7th Cir.2003)).

Applied to the case *sub judice*, the inquiry is whether it was reasonable for Gresbach to believe that Reetz's consent to interview the children included consent to conduct a search of the children's bodies. We find that it was not. Based on Gresbach's representations that she needed to "see the children" to investigate a child abuse allegation, and that Reetz need not be present for the interview, Reetz allowed Gresbach to speak to the children privately in order to obtain their statements about an allegation of child abuse. A reasonable person would not have interpreted this to mean that Reetz authorized Gresbach to search the children's bodies. It is undisputed that Gresbach did not ask Reetz for permission to search the children for injuries. Gresbach argues that Reetz's "general consent" to interview included the consent to inspect the children's bodies, but she cites to no supporting

relevant authority, and we are unaware of any case under Fourth Amendment jurisprudence that proscribes this notion.

In some instances, the line implicating Fourth Amendment concerns is blurred when it applies to the government and child abuse investigations. *See Heck*, 327 F.3d at 514 (acknowledging that there are circumstances in which the law of warrant and probable cause does not work effectively in the child removal or child examination context); *Landstrom*, 892 F.2d at 676 (holding that a search or seizure of a child by a state social worker must be "reasonable," but that does not necessarily require probable cause or a warrant); *Daryl H.*, 801 F.2d at 902 (stating that the government must fulfill its responsibility to protect the young under difficult circumstances). Recognizing the sensitive nature of these types of investigations, officials may make a search or seizure under exigent circumstances, where they have reason to believe life or limb is in jeopardy.[3] *See Brokaw*, 235 F.3d at 1010. We do not exempt child welfare workers from adhering to basic Fourth Amendment principles under non-exigent

3. *Heck* foreclosed the justification of the "special needs" exemption in this context, because states have "the ability to take immediate action to ensure the physical safety of a child suspected of abuse who is located on private property" through the exigent circumstances exception to the warrant requirement of the Fourth Amendment. *Heck*, 327 F.3d at 517 n. 20. While it seems unlikely from the record that Gresbach could have reasonably suspected the children's safety was at risk, she does not raise this issue on appeal.

circumstances—to do so would be imprudent. In these circumstances, caseworkers can take preliminary steps short of searches, such as interviewing the child and a parent, or obtaining a warrant either personally to conduct a search or to have a doctor perform the search. *See Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 407 (5th Cir.2002).

Gresbach advocates the position that a warrant is for police officers, not caseworkers, and that the probable cause and warrant requirement are more appropriately geared towards the investigation of the abusers, not the victims. We disagree. The Fourth Amendment preserves the right to be free from warrantless searches by the government, without limiting that right to one type of official. *See Calabretta v. Floyd*, 189 F.3d 808, 813-14 (9th Cir.1999). The requirement that a child welfare worker obtain the equivalent of a warrant before conducting a search (absent exigent circumstances) can effectively protect children, without having to excuse workers from obtaining advance judicial approval of searches and seizures. *Heck*, 327 F.3d at 514; *see Tenenbaum*, 193 F.3d at 604. Additionally, nothing in the record supports Gresbach's belief that obtaining a warrant would have delayed and thus compromised her investigation.

Because Gresbach conducted a search of each child on private property without consent, a warrant or probable cause, or exigent circumstances, Ian and Alexis's Fourth Amendment rights to be free from unreasonable searches were violated.

B. Clearly Established Law

Despite her participation in this constitutionally impermissible conduct, Gresbach may nevertheless be shielded from liability for civil damages if Plaintiffs fail to meet their burden of proving that Gresbach's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)); *Sonnleitner v. York*, 304 F.3d 704, 716-17 (7th Cir.2002). In determining whether a defendant's alleged actions violated a clearly established right, courts may properly take into account any information the defendant should have reasonably obtained. *Jones v. Wilhelm*, 425 F.3d 455, 461 (7th Cir.2005). Moreover, the salient question is whether the law at the time of the disputed conduct gave defendants fair warning that their alleged treatment of plaintiffs was unconstitutional. *Id.*; *see also Creighton*, 483 U.S. at 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (internal citations omitted).

As we stated above, the structures of the Fourth Amendment apply to social workers. *Heck*, 327 F.3d at 511. Plaintiffs argue that our decision in *Heck* precludes Gresbach's understanding of her rights to conduct a child abuse investigation under § 48.981(3)(c)1, and we

agree. "[T]o the extent § 48.981(3)(c)1 authorizes government officials to conduct an investigation of child abuse on private property without a warrant or probable cause, consent, or exigent circumstances, the statute is unconstitutional." *Id.* at 515-16. Considering the facts above in the light most favorable to the Plaintiffs, we find that a reasonable child welfare worker would have known that conducting a search of a child's body under his clothes, on private property, without consent or the presence of any other exception to the warrant requirement of the Fourth Amendment, is in direct violation of the child's constitutional right to be free from unreasonable searches.

Gresbach argues that *Heck* is distinguishable from this case, because *Heck* did not address the issue of scope of consent in the context of child abuse investigations. However, a general constitutional rule already identified may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful. *Hope,* 536 U.S. at 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (quoting *Lanier,* 520 U.S. 259, 270-71, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)); *see also Jones,* 410 F.3d at 1230 (holding that officials committing outrageous, yet *sui generis,* constitutional violations ought not to shield their behavior behind qualified immunity simply because another official has not previously had the audacity to commit a similar transgression). Officials can still be on notice that their conduct violates established law even in novel factual circumstances. *Hope,* 536 U.S. at 741, 122 S.Ct. 2508, 153 L.Ed.2d 666. In this case, it was

clearly established that the scope of consent to interview does not extend to a search of an individual's body under *Jimeno* and its progeny.

Gresbach further argues (as the caseworkers did in *Heck*) that we should apply the "reasonableness" framework we laid out in *Daryl H.*, where we held that the constitutionality of a visual inspection of a child's body who may be a victim of child abuse should be evaluated under the reasonableness test of the Fourth Amendment. *Daryl H.*, 801 F.2d at 902 ("[U]nder the circumstances of that particular search in a public school, we could not say that a visual inspection of a child's body can only be performed if a social worker has probable cause or obtained a warrant."). We declined to accept this argument in *Heck*, and we do the same here. The key difference between the searches in *Daryl H.* and in *Heck* was that the search in *Daryl H.* took place on public school grounds with the consent of public school officials, whereas in *Heck*, as here, the search took place on private property. *Heck*, 327 F.3d at 514. *Heck* found that *Daryl H.* stood for the proposition that a lower standard of scrutiny applies to searches and seizures conducted by government officials on public school property. *Id.* (citing *Brokaw*, 235 F.3d at 1011). This case falls squarely within the scope of *Heck*, as the search took place at a private school.

While we recognize that "child welfare caseworkers are often called upon to make difficult decisions without the benefit of extended deliberation" in order to prevent "the most vulnerable members of society, children of tender years, from being physically abused," *Heck*, 327 F.3d at 525, we do not believe that requiring a child welfare caseworker to act in accordance with basic Fourth Amendment principles is an undue burden on the child welfare system, particularly when it is necessary to conduct an examination of a child's body, which is undoubtedly "frightening, humiliating, and intrusive" to the child. At the time Gresbach conducted the searches at Good Hope in 2004, there was a clearly established doctrine as to what actions a Bureau caseworker must take when conducting a child abuse investigation at a private school. Today we reiterate *Heck*'s definitive holding, along the lines of the Fourth Amendment principles outlined above, that it is a violation of a child's constitutional rights to conduct a search of a child at a private school without a warrant or probable cause, consent, or exigent circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED AND FILED MARCH 19, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 05-C-650

MICHAEL C., CHERITA C., KIMBERLY W., ALEXIS C. and IAN W.,

Plaintiffs,

v.

DANA GRESBACH, DENISE REVELS ROBINSON and HELENE NELSON,

Defendants.

DECISION AND ORDER

Three adult plaintiffs, parents and step-parents of the two minor plaintiffs, step-siblings Ian W. ("Ian") and Alexis C. ("Alexis"), and the minor plaintiffs, bring this action under 42 U.S.C. § 1983. They seek damages against defendant Dana Gresbach, a social worker, alleging that she subjected each of the minor plaintiffs to an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments and violated all plaintiffs' rights to due process of law in violation of the Fourteenth Amendment. Plaintiffs also assert official

capacity claims against Gresbach and two of her superiors, seeking declaratory and injunctive relief, and raise supplemental state law claims. Before me are plaintiffs' motion to strike, plaintiffs' motion for partial summary judgment, and defendants' motion for summary judgment.

I. FACTS

Alexis and Ian attended the Good Hope Christian Academy ("Good Hope"), a private elementary school in Milwaukee. In February 2004, a relative reported to the Bureau of Milwaukee Child Welfare ("MCW"), a subagency of the Wisconsin Department of Health and Family Services ("DHFS"), that Michael hit Ian on the wrist with a plastic stick. MCW assigned Gresbach to investigate. Gresbach visited Good Hope and advised school principal Cheryl Reetz that she was investigating an allegation of child abuse and that she wished to interview Ian and Alexis. Reetz asked whether she should first contact Ian and Alexis's parents, and Gresbach discouraged her from doing so. Reetz also asked if she could observe the interviews, and Gresbach said that she could not.

Gresbach first interviewed Ian, who told her that Michael sometimes hit him with a flexible stick. Gresbach examined Ian's wrist and saw no marks. She then told Ian to lift up his shirt. Ian did so and Gresbach examined him and found no evidence of injury. Gresbach then interviewed Alexis, who told her that her parents sometimes gave her "whoppings," but that they had not

caused marks or injuries. (Pls.' Mot. for Summ. J. Ex. 4 at 3.) Gresbach told Alexis to pull down her tights, and Alexis did so.[1] Gresbach examined her and again found no evidence of harm. Gresbach took no further action regarding the matter.

I will state additional facts in the course of the decision.

II. MOTION TO STRIKE

Plaintiffs move to strike the affidavits of Gresbach's coworkers submitted in support of Gresbach's claim of entitlement to qualified immunity. The affiants aver that they would have handled the matter as Gresbach did. Plaintiffs argue that defendants failed to timely disclose the affiants' identities and that the affidavits contain inadmissible opinion testimony. Defendants respond that they only recently became aware of the names of the affiants and that the affidavits are factual in nature. While I am skeptical as to whether the affidavits present facts as opposed to opinions, I will deny plaintiffs' motion to strike. As discussed below in determining whether Gresbach is entitled to qualified immunity, I find the affidavits of little value.

---

1. It is not clear whether Gresbach required Alexis to take off additional clothes. Gresbach stated in her deposition that she probably checked Alexis's arms, back, legs and torso. (Glinski Aff. Ex. B at 121.)

Appendix B

III. MOTIONS FOR SUMMARY JUDGMENT

A. Standard

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). For a dispute to be "genuine," the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For a dispute to be "material," it must relate to facts that might affect the outcome of the suit under the governing law. *Id.*

In evaluating a motion for summary judgment, I draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Where, as here, both parties have moved for summary judgment both are required to show that no genuine issues of fact exist, taking the facts in the light most favorable to the party opposing each motion. If issues of fact exist, neither party is entitled to summary judgment. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir.1983).

Appendix B

B. Fourth Amendment Claims

1. Applicable General Principles and Nature of Claims

Plaintiffs may recover under § 1983 if they can establish that a defendant violated their constitutional rights under color of state law. *Abraham v. Piechowski*, 13 F.Supp.2d 870, 880 (E.D.Wis.1998). Ian and Alexis claim that Gresbach violated their Fourth and Fourteenth Amendment rights both by interviewing them and by examining their bodies under their clothes, and they seek summary judgment on the issue of Gresbach's liability for the latter conduct. Gresbach denies that she violated their rights and also argues that she is entitled to qualified immunity. She moves for summary judgment on Ian's and Alexis's Fourth Amendment claims. In addressing the parties' motions, I first determine whether Gresbach violated Ian's and Alexis's constitutional rights. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (stating that the first step in deciding whether an official is entitled to qualified immunity is determining whether the facts taken in the light most favorable to the claimant establish a violation of a constitutional right).

The Fourth Amendment protects "[t]he right of the people to be secure in the persons, homes, papers, and effects against unreasonable searches and seizures." U.S. Const. Amend. IV. The protection provided in the amendment extends to children subjected to searches and/or seizures by social workers and to the schools in

which they are enrolled. *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir.2003).

In *Heck*, the plaintiffs alleged that based on a report that a private school principal was corporally punishing students, MCW social workers visited the church that housed the school and asked to interview a child who had reportedly been paddled. *Id.* at 502-03. The principal and the church's pastor refused to permit the interview. *Id.* at 503. The social workers then called the police, who directed the principal and the pastor to allow the interview, which they did. *Id.* The Seventh Circuit concluded that the social workers had unreasonably searched the church and unreasonably seized the child. *Id.* at 510. The court held that child protection workers could only enter a private school and interview a child without the principal's consent if they had probable cause, entered pursuant to a court order or if there were exigent circumstances. *Id.* at 513. The court further stated that "to the extent Wis. Stat. § 48.981(3)(c)(1) [which permits a child welfare worker to interview a child "at any location without permission from the child's parent, guardian, or legal custodian if necessary to determine if the child is in need of protection or services"] authorizes government officials to conduct an investigation of child abuse on private property without a warrant or probable cause, consent or exigent circumstances, the statute is unconstitutional." *Id.* at 515-16. However, because the court found the statute to be facially valid at the time that the social workers acted, the court held that the social workers were entitled to qualified immunity. *Id.* at 516. Nevertheless,

it noted that: "We now make it clear that it is patently unconstitutional for government officials to search the premises of a private or parochial school and/or seize a child attending that school without a warrant or court order, probable cause, consent, or exigent circumstances." *Id.* at 517.

In the present case, Gresbach did not have a court order and defendants do not assert that she had probable cause or that exigent circumstances existed. However, defendants argue that she acted reasonably because Reetz, who stood in loco parentis with respect to the children, consented to her actions. Ian and Alexis do not dispute that Reetz had the authority to permit Gresbach to interview them but argue that whether she voluntarily consented to the interviews is a question of fact for a jury and that Reetz did not consent to Gresbach's under the clothes examinations as a matter of law.

2. Standards for Determining Consent, Scope of Consent and Voluntariness of Consent

A search or seizure does not violate the Fourth Amendment if an authorized person consents to it. A person can manifest consent through actions as well as words. *United States v. Walls*, 225 F.3d 858, 863 (7th Cir.2000) (stating that by opening a door and stepping back to allow police entry, a defendant can consent to the police entry into his home). The permissible scope of a search made lawful by consent is limited by the scope of the consent. *Florida v. Jimeno*, 500 U.S. 248, 251,

111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). In determining the scope of consent, a court asks, "what would the typical reasonable person have understood the scope of consent to be by the exchange between the [official] and the [consentor]." *Id.; see also United States v. Breit*, 429 F.3d 725, 729 (7th Cir.2005). When the consentor expressly limits the scope of her consent, the official must limit her action accordingly. *Breit*, 429 F.3d at 730.

When the lawfulness of an official action depends on consent, the consent must be "in fact voluntarily given and not the result of duress or coercion express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). A § 1983 plaintiff challenging the voluntariness of consent bears the burden of establishing involuntariness. *Valance v. Wisel*, 110 F.3d 1269, 1279 (7th Cir.1997). Courts have developed the law of voluntary consent primarily in criminal cases, but such law is also applicable in civil cases such like the present case.[2]

---

2. Defendants argue that the standard for determining voluntariness is less stringent in civil than in criminal cases and cite *E.Z. v. Coler*, 603 F.Supp. 1546, 1556 (N.D.Ill.1985). However, I find that decision's analysis unpersuasive and reject it. I note also that the Seventh Circuit has disapproved of it. *Darryl H. v. Coler*, 801 F.2d 893, 907 (7th Cir.1986). Nevertheless, the context in which an official acts may factor into the voluntariness determination. For example, a court may view a claim of coercion involving a police officer with a gun differently than a claim of coercion involving a social worker. Nevertheless, if a social worker coerces consent, a court must find such consent involuntary.

Appendix B

Generally, the test for determining whether consent is voluntary is whether a reasonable person in the consentor's position would believe that she is free to refuse consent. *United States v. Drayton*, 536 U.S. 194, 206-07, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002); *United States of America v. Wade*, 400 F.3d 1019, 1022 (7th Cir.2005); *see also Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (stating that factual determinations relating to the lawfulness of a search or seizure are judged by an objective standard). In applying this test, a court looks to whether the official took an action, such as detaining the consentor, or made a statement that would lead a reasonable person to conclude that she could not freely refuse consent.[3] *See Drayton*, 536 U.S. at 206, 122 S.Ct. 2105; *Wade*, 400 F.3d at 1022. Because voluntariness is determined based on a reasonable person standard, it is treated as a question of law. *Wade*, 400 F.3d at 1021; *see also Ornelas v. United States*, 517 U.S. 690, 696-99, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (holding that the ultimate question of whether historical facts amount to "reasonable suspicion" and "probable cause" should be treated as questions of law); *United States v. D.F.*, 115 F.3d 413, 418 (7th Cir.1997) (applying *Ornelas* to a voluntariness determination).

---

3. An official may attempt to rebut a claim of involuntariness by showing that she advised the consentor of her constitutional right to refuse consent, but such advisement is generally not required. *See United States v. Sandoval-Vasquez*, 435 F.3d 739, 744 (7th Cir.2006).

Courts often do not articulate the voluntariness test as I have.[4] Rather, they quote *Schneckloth* to the effect that voluntariness "is a question of fact dependent upon the totality of the circumstances," *see, e.g., Sandoval-Vasquez*, 435 F.3d at 744 (citing *Schneckloth*, 412 U.S. at 227, 93 S.Ct. 2041). However, a careful reading of *Schneckloth* indicates that a more nuanced understanding of the above quotation is that voluntariness is heavily dependent on the surrounding facts and circumstances. *See State v. Phillips*, 218 Wis.2d 180, 193, 577 N.W.2d 794 (1998) (stating that:

> In holding that voluntariness of consent is a question of fact, the . . . Court in *Schneckloth* primarily relied on its conclusion that a proper analysis of the issue does not turn on per se rules or bright-line tests, but rather is very fact-specific and based on the totality of circumstances involved in each case.)

Thus, in a civil case, while determining voluntariness may require a jury to resolve factual questions such as whether the official's or the consentor's version of a conversation is more credible, *Gower v. Vercler*, 377 F.3d 661, 667 (7th Cir.2004), where the facts are largely

4. In the context of a motion to suppress evidence, whether voluntariness is a question of fact or law likely matters little because a judge makes the decision regardless. This may be why few courts have examined the issue. However, in a civil case, whether voluntariness is a question of fact or law becomes more important because the outcome may determine whether voluntariness is decided by a jury or a judge.

undisputed, the ultimate question must be resolved by the court, *Wade*, 400 F.3d at 1021 (stating that credibility determinations underlying a finding of voluntary consent are issues of fact but that the ultimate voluntariness finding is an issue of law); *Ornelas*, 517 U.S. at 699, 116 S.Ct. 1657; *see also Drayton*, 536 U.S. at 206, 122 S.Ct. 2105; *Rodriguez*, 497 U.S. at 188, 110 S.Ct. 2793 (both indicating the objective nature of the voluntariness inquiry).

Courts also often state that voluntariness depends in part on the particular characteristics of the consentor, such as age, intelligence and education. *See, e.g., Sandoval-Vasquez*, 435 F.3d at 744. However, commentators have noted, and a review of the cases confirms, that individual characteristics affect the voluntariness determination only when the consentor is uniquely vulnerable in a way recognizable to a reasonable official, *see United States v. Grap*, 403 F.3d 439, 443-44 (7th Cir.2005), and the official exploits the vulnerability to obtain consent, *see* Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 222-23 (2001).

3. Application of Standards

The only evidence in the record concerning Gresbach's conversation with Reetz are Gresbach's and Reetz's depositions and Reetz's affidavit. Gresbach and Reetz's recollections of the conversation are largely similar. Gresbach states that she gave Reetz her card and said that she was investigating a claim of abuse.

She states that she did not specifically ask Reetz for permission to see Ian and Alexis but said that she wanted to see them. She states that Reetz inquired about contacting the children's parents and that she discouraged her from doing so. She states that Reetz asked how she ordinarily conducted interviews with children and that she responded that investigators generally spoke to the children before speaking to others. She states that Reetz asked her whether she could sit in on the interviews and that she said no. She states that she did not disclose to Reetz her plan to physically examine the children for signs of abuse.

Reetz states that when she arrived, Gresbach stated that:

> she would like to see Ian and Alexis, that she was here to see them. I asked if I needed to call the parents and the response was no so I went and got the students one at a time and then asked if I could go in and she said that I didn't need to.

(Glinski Aff. Ex. A at 13.) Reetz states that Gresbach did not explain the exact nature of the investigation. She states that she assumed that Gresbach had the right to talk to the children with or without her permission, although Gresbach did not say this. When asked whether Gresbach said anything that caused her to think that she couldn't refuse Gresbach's request to interview the children, Reetz responded, "[j]ust the fact that I asked if I should call the parents and she said I didn't need to

so I'm, my assumption then was that the parents didn't need to be alerted that they were trying to see the children prior to the parents having knowledge." (*Id.* at 14-15.) Reetz states that Gresbach did not prevent her from calling the children's parents and behaved in a pleasant and professional manner.

Based on the foregoing evidence, no reasonable factfinder could conclude that Reetz did not consent to Gresbach's request to interview the children. Neither Gresbach nor Reetz recalls precisely how Gresbach inquired about seeing the children, but both agree that Gresbach communicated to Reetz her desire to speak with the children. By retrieving the children for the interviews, Reetz consented to the request, albeit non-verbally. *See Walls*, 225 F.3d at 863.

Further, Reetz's consent to Gresbach's request to interview the children was voluntary. Gresbach did nothing that would have "indicated to a reasonable person [in Reetz's position] that . . . she" was not free to refuse the request. *See Drayton*, 536 U.S. at 206, 122 S.Ct. 2105.[5] Gresbach conversed with Reetz in Reetz's office and communicated in an amicable and professional fashion. She employed no coercive tactics and did not repeatedly ask to conduct the interviews.

---

5. I note that, even if I viewed the ultimate question of voluntariness as one of fact—which, as I have indicated, I do not—I would reach the same result. No reasonable jury could conclude that Reetz involuntarily consented to Gresbach's request to interview the children.

Nothing in the record suggests that Reetz was uniquely vulnerable or that Gresbach exploited her. Plaintiffs suggest that the fact that Reetz asked Gresbach questions about child abuse investigations indicates a vulnerability. I disagree. The fact that Reetz was unfamiliar with the law of child abuse does not mean that she was mentally or emotionally vulnerable. Nor can I infer involuntariness from the fact that Gresbach did not tell Reetz that she did not have to consent to her request to interview the children. Whether an official informs a consentor of her right to refuse is only one factor in the voluntariness test. *See Schneckloth*, 412 U.S. at 227, 93 S.Ct. 2041. While an official's misrepresentation can cause consent to be involuntary, Gresbach did not misrepresent her authority. While Gresbach's and Reetz's statements are sometimes confusing, they indicate that Reetz asked whether she could permit Gresbach to interview the children without calling their parents and whether she could witness the interviews. Gresbach responded accurately to the first question and although she should not have told Reetz that she could not witness the interview, she never intimated that Reetz could not withhold consent altogether if she was uncomfortable with Gresbach interviewing the children alone. Thus, the facts of the present case are unlike those in a submission to authority case, *see* Strauss, *supra*, at 224-25, and indicate that Reetz's consent was "in fact voluntarily given, and not the result of duress or coercion, express or implied," *Schneckloth*, 412 U.S. at 248, 93 S.Ct. 2041.

Appendix B

I turn now to the question of whether Reetz authorized Gresbach to examine the children's bodies. The evidence unequivocally establishes that Gresbach did not disclose to Reetz her intention to conduct such examinations and did not request permission to do so. Thus, no reasonable jury could find that Reetz consented to the examinations. Defendants argue that a reasonable person would have understood that by consenting to the interviews with the children, she also consented to their being examined. I disagree. First, Gresbach never specifically disclosed to Reetz the exact nature of her investigation, i.e., that it focused on whether Ian and Alexis had themselves been abused and was not an investigation of a more general nature in which Ian and Alexis might be witnesses. Second, both in common parlance and from the standpoint of the Fourth Amendment, an interview is different from a search and consent to interview does not constitute consent to search. From the standpoint of the Fourth Amendment, a brief detention of a child by an official for the purpose of conducting an interview is a seizure, *Heck*, 327 F.3d at 510, while the visual inspection of "those parts of [the child's] body usually covered by clothing" is a search. *Darryl H.*, 301 F.2d at 900. And, in fact, in *Darryl H.*, the Seventh Circuit emphasized the "frightening," "humiliating" and "intrusi[ve]" nature of an examination of a child's body remarkably similar to those that Gresbach conducted in the present case. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Thus, it is patently unreasonable to suggest that by authorizing Gresbach to talk to Ian and Alexis, Reetz implicitly authorized her to partially or wholly undress them.

Appendix B

The distinction between a brief detention to conduct an interview and a search becomes clearer upon consideration of the following hypothetical. Imagine Ian and Alexis as adults approached by a police officer lacking probable cause to arrest. The officer asks them if they will answer her questions about a narcotics investigation, and they agree. After conversing with Ian for a few minutes, the officer pulls up his shirt. Even more startling, after conversing with Alexis for a few minutes, the officer pulls up her dress and pulls down her stockings. No one would disagree that the officer acted beyond the scope of consent. The adult Ian and Alexis consented to a brief detention for the purpose of an interview, not to a search for narcotics, much less an under-the-clothes examination. The scope of consent analysis in the present case is not different because Gresbach searched children too young to know that they did not have to allow her to look underneath their clothes. *See Darryl H.*, 801 F.2d at 901 (stating that "a child of very tender years may not exhibit a subjective expectation of privacy in the same sense as an older child. He is, however, a human being, entitled to be treated by the state in a manner compatible with that human dignity.").

Defendants think it significant that plaintiffs failed to present evidence concerning Reetz's belief about the scope of her consent. However, as previously discussed, the scope of consent does not depend on Reetz's unspoken beliefs but on how a reasonable person would have interpreted her statements and actions. *Jimeno*, 500 U.S. at 251, 111 S.Ct. 1801. Reetz neither said nor

did anything that would lead a reasonable person to believe that she authorized Gresbach to examine Ian's and Alexis's bodies.

Thus, I find that Gresbach violated Ian's and Alexis's Fourth Amendment right to be free from unreasonable searches.

4. Whether Gresbach is Entitled to Qualified Immunity

"Qualified immunity protects government officials from civil liability when performing discretionary functions so long as 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Alvarado v. Litscher*, 267 F.3d 648, 652 (7th Cir.2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Thus, after a court finds that an official has violated a constitutional right, it turns to the question of whether the right was "clearly established" at the time of the alleged violation. *Id.* The relevant, dispositive inquiry in determining whether a right is clearly established is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. It is not necessary that the very action being challenged has been previously held unconstitutional, so long as the unlawfulness was apparent in light of existing law. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The plaintiff bears the burden of establishing the

existence of a clearly established constitutional right. *Jacobs v. City of Chicago*, 215 F.3d 758, 766 (7th Cir.2000).

It would have been clear to a reasonable official at least by 2004 that under the circumstances in which it occurred, Gresbach's under-the-clothes examination of Ian and Alexis was unlawful. Thus, Gresbach is not entitled to qualified immunity. The Seventh Circuit announced in *Heck* that "the strictures of the Fourth Amendment apply to child welfare workers as well as to all other governmental employees." 327 F.3d at 509. And in language clearly intended to preclude future claims of qualified immunity for similar violations, the court stated that "it is patently unconstitutional for government officials to . . . seize a child attending [a private or parochial] school without a warrant or court order, probable cause, consent, or exigent circumstances." *Id.* at 517. Further, courts had already clearly established that for Fourth Amendment purposes, an examination of a child's body is a search, *Darryl H.*, 801 F.2d at 900, and that the scope of government actions made lawful by consent is limited by the breadth of consent, *Jimeno*, 500 U.S. at 251, 111 S.Ct. 1801. Thus, well before Gresbach examined Ian's and Alexis's bodies, it was clearly established that consent to a brief period of detention for purposes of an interview does not constitute consent to a search of the person, particularly an under-the-clothes search.

Defendants argue that *Heck* only established the law to be applied where a school administrator does not

consent to a brief detention of a child pursuant to a child welfare investigation and that the scope-of-consent law applicable to the present case is uncharted territory. Defendants also present the affidavits of Gresbach's co-workers, setting forth their understanding of the law. However, neither defendants' argument nor the co-workers' affidavits are persuasive. *Heck* made clear that the Fourth Amendment applies to child welfare workers. *Heck* also applied well-established judicial interpretations of the Fourth Amendment and did not modify them because social workers rather than police officers conducted the search. *See id.* at 513 (stating that the search of the school and the seizure of the child could only be upheld if they fell within one of the "'specifically established and well delineated exceptions' to the Fourth Amendment's warrant and probable cause requirements" and quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), and *Schneckloth*, 412 U.S. at 219, 93 S.Ct. 2041). Thus, *Heck* put child welfare officials on notice that they are subject to the Fourth Amendment and to cases applying it. And *Jimeno*, 500 U.S. at 251, 111 S.Ct. 1801, and its progeny put officials on notice that government action made lawful by consent is limited by the breadth of consent. That Gresbach's co-workers may not be familiar with such decisions does not make them less clearly established.

As previously indicated, to show that law is clearly established, plaintiffs do not need to cite a specific scope-of-consent case in which a government official obtained consent for a brief detention and interview and then

searched the detainee underneath her clothes without further consent. *See Anderson*, 483 U.S. at 640, 107 S.Ct. 3034; *see also Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (stating that "fundamentally similar facts" are not necessary to a find that a rule of law is clearly established). And that plaintiffs have not found such a case is not surprising. Rather, based on the general principles of the law of consent, it is immediately apparent that consent to an interview, even for the purpose of investigating a report of abuse, does not amount to consent to a beneath-the-clothes search. Thus, under *Heck*, *Darryl H.*, and *Jimeno*, a reasonable official would have known that she lacked consent to conduct such a search.

B. Due Process Claims

Plaintiffs also contend that defendants violated their rights to substantive and procedural due process, and defendants move for summary judgment on such claims. In *Heck*, the Seventh Circuit found that the plaintiffs established violations of substantive and procedural due process. 327 F.3d at 524, 527.[6] The court's analysis

---

6. With respect to substantive due process, the court found among other things that the defendants had violated the plaintiffs' rights to familial relations by conducting a custodial interview of the minor plaintiff without notifying his parents or obtaining their consent and by targeting the parents as child abusers without reasonable suspicion. *Heck*, 327 F.3d at 524.

With respect to procedural due process, the court found that the defendants had violated the plaintiffs' rights by:

(Cont'd)

suggests that the viability of such claims depends at least in part on the existence of a Fourth Amendment violation. *See id.* at 520-27.

In the present case, relying on their contention that Gresbach did not violate Ian's and Alexis's Fourth Amendment rights, defendants have not independently analyzed plaintiffs' due process claims. However, I have now found a Fourth Amendment violation, albeit one that differs somewhat from that found in *Heck*. In any case, defendants have not stated enough to prevail on their motion. Further, in light of the present decision, the parties may wish to revisit the due process claims. Therefore, I will deny defendants' motion for summary judgment with respect to such claims without prejudice and permit the parties to file additional material if they wish.

(Cont'd)

> (1) failing to obtain a warrant or court order before searching the church and seizing the minor plaintiff; (2) interrogating the minor plaintiff without first notifying his parents or obtaining their consent; and (3) investigating the parents for child abuse and threatening to remove their children without definite and articulable evidence giving rise to a reasonable suspicion that the parents had abused the children or that the children were in imminent danger of abuse.

Id. at 527.

C. Remaining Claims

Plaintiffs assert official capacity claims against defendants, seeking injunctive and declaratory relief with respect to those claims.[7] Defendants argue that I lack jurisdiction over plaintiffs' additional federal law claims because plaintiffs fail to establish a threat of injury sufficiently immediate to make their request for an injunction justiciable.

In order to establish jurisdiction, plaintiffs must allege a case or controversy within Article III of the Constitution. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). To obtain an injunction or declaratory judgment, they must establish that they face a threat of future injury that is both real and immediate. *Id.* at 101-02, 103 S.Ct. 1660. Plaintiffs cannot establish a real and immediate injury merely by proving past exposure to illegal conduct, though past wrongs may be evidence bearing on whether there is a real and immediate threat of being exposed to such conduct again in the future. *Id.* at 102, 103 S.Ct. 1660. In *Lyons*, the plaintiff sued the City of Los Angeles after police used a "chokehold" on him during a routine traffic stop, alleging that such force was unconstitutionally excessive. *Id.* at 105, 103 S.Ct. 1660. The Supreme Court held that he had not shown sufficient evidence that he would be unreasonably subjected to a chokehold a

7. Plaintiffs assert that defendants Robinson and Nelson failed to train MCW employees and set policies to prevent Gresbach and other employees from taking unconstitutional action.

second time and that his claim was therefore not justiciable. *Id.* at 108, 103 S.Ct. 1660. It noted that even assuming that Los Angeles police regularly place citizens in chokeholds, the plaintiff was only one man in a large city and thus the odds were against police again placing him in a chokehold. *Id.*

Thus, for plaintiffs in the present case to establish justiciability, they must show that defendants are likely to search or authorize a search of Ian and Alexis a second time unless I enjoin them from doing so. Plaintiffs have not met their burden. As such, I lack jurisdiction over their official capacity claims for declaratory and injunctive relief and will dismiss them.

Finally, I will also dismiss plaintiffs' supplemental state law claims. Plaintiffs appear to have conceded that I lack jurisdiction over their state claims for damages because they failed to properly serve the state attorney general as required by Wisconsin law. And Wisconsin law on standing to seek prospective equitable relief mirrors federal law. *See Fox v. Wisconsin Dept. of Health and Social Services*, 112 Wis.2d 514, 525, 334 N.W.2d 532 (1983).

Because I have dismissed all claims for equitable relief and plaintiffs' claims against Gresbach's superiors, defendants Robinson and Nelson, exclusively seek equitable relief,[8] I will dismiss Robinson and Nelson

8. Indeed, the Eleventh Amendment would bar plaintiffs from seeking damages from Robinson and Nelson in their official capacities.

from this action and will not address the merits of plaintiffs' claims against them alleging failure to train and failure to set policies to prevent constitutional violations.

IV. CONCLUSION

Therefore,

IT IS ORDERED that plaintiffs' motion to strike is **DENIED.**

IT IS FURTHER ORDERED that defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART,** as stated herein.

IT IS ALSO ORDERED that plaintiffs' motion for partial summary judgment is **GRANTED.**

IT IS ADDITIONALLY ORDERED that defendants Denise Revels Robinson and Helene Nelson are **DISMISSED** from this action.

Dated at Milwaukee, Wisconsin, this 19 day of March, 2007.

/s

LYNN ADELMAN
District Judge

Supreme Court, U.S.
FILED
SEP 22 2008
OFFICE OF THE CLERK

No. 08-220

IN THE
Supreme Court of the United States

DANA GRESBACH,

Petitioner,

v.

MICHAEL C., CHERITA C., KIMBERLY W., ALEXIS C, and IAN W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL D. DEAN
MICHAEL D. DEAN, LLC
20975 Swenson Drive
Suite 125
Waukesha, WI 53186
(262) 798-8044

STEPHEN M. CRAMPTON
Counsel of Record
MARY E. MCALISTER
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000

Attorneys for Respondents

218354

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a social worker conducting a child abuse investigation based on information twelve days old was correctly denied qualified immunity when she required an eight year old boy and his nine year old step-sister at a private school to remove items of clothing in order to allow her to examine their bodies for marks, based solely on permission to "interview" the children?

2. Whether government social workers conducting child abuse investigations, which routinely involve a dual purpose implicating both civil and criminal law, should be excepted from traditional Fourth Amendment standards, where such investigations regularly include physical examinations infringing fundamental rights of bodily privacy and of familial integrity?

3. Whether Gresbach waived her argument that the special needs exception should apply to social workers when she failed to raise it in the trial court?

4. Whether a social worker was properly denied qualified immunity when she acted contrary to both recent binding Seventh Circuit precedent and this Court's previous pronouncement in *Florida v. Jimeno*, 500 U.S. 251 (1991), by performing warrantless physical examinations on minor children without consent, probable cause, or exigent circumstances?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Summary	1
B. Statement of Facts	3
1. First allegation	3
2. Second allegation	4
3. The Interviews with the Children	6
REASONS FOR DENYING THE PETITION	7
I. THERE IS NO SPLIT IN THE CIRCUITS BECAUSE THE "SPECIAL NEEDS" EXCEPTION APPLIES TO ABUSE INVESTIGATIONS IN *PUBLIC* SCHOOLS, NOT *PRIVATE* SCHOOLS.	7
A. "Consent" and "Exigent Circumstances" are the Traditional Exceptions to the Fourth Amendment's Probable Cause-Warrant Requirement.	8

Contents

Page

B. The Reasonableness Standard is not Applicable Outside the Narrow Class of Cases Qualifying for the "Special Needs" Exception. 10

II. THE CIRCUITS UNIFORMLY LIMIT THE SPECIAL NEEDS-REASONABLENESS ANALYSIS TO PUBLIC SCHOOL SEARCHES AND APPLY BASIC WARRANT EXCEPTIONS TO PRIVATE SCHOOL SEARCHES. 12

A. The Circuits Uniformly Apply the Warrant Requirement and Permitted Exceptions. 13

B. The Circuits Uniformly Follow this Court's Limitation of the Special Needs-Reasonableness Analysis to Public School Searches. 14

C. Gresbach Mischaracterizes *Wojcik* and *Wildauer*. 15

D. The Circuits Uniformly Follow Black Letter Warrant Exceptions in Analyzing Searches on Private School Premises. 18

Contents

	Page
III. THIS COURT HAS STRICTLY LIMITED THE *T.L.O.* "SPECIAL NEEDS" EXCEPTION TO SEARCHES ON PUBLIC SCHOOL PROPERTY, AND THERE IS NO NEED TO EXTEND IT TO PRIVATE SCHOOL PROPERTY.	20
A. There Is No Split Among the Circuits Applying the Special Needs Exception to Child Welfare Investigations.	20
B. Gresbach Failed to Raise this Argument Below.	22
C. Applying the Special Needs-Reasonableness Analysis to *All* Child Welfare Investigations Would Swallow Both the General Warrant-Probable Cause Rule and the Consent and Exigent Circumstances Exceptions.	24
IV. THERE IS NO SPLIT IN THE CIRCUITS CONCERNING INVESTIGATIONS ON PRIVATE PROPERTY, AND EVEN IF THERE WERE, THE LAW WAS CLEARLY SETTLED IN THE SEVENTH CIRCUIT.	25
CONCLUSION	28

TABLE OF CITED AUTHORITIES

Page

Cases:

Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 21, 22

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) 21

Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000) ... 26

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) 14

Camara v. Municipal Court, 387 U.S. 523 (1967) 9, 10

Coolidge v. New Hampshire, 403 U.S. 443 (1970) 13

Curtis v. Thompson, 840 F.2d 1291 (7th Cir. 1988) 10

Danforth v. Minnesota, ___ U.S. ___, 128 S. Ct. 1029 (2008) 22

Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) ... 15

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) ..... *passim*

Cited Authorities

Page

Doe v. Louisiana, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994) 27

Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) 14

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 12

Florida v. Jimeno, 500 U.S. 248 (1991) ..... i, 19

Gates v. Texas Dept. of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008) 25

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 10

Good v. Dauphin County Social Services for Children and Youth, 891 F.2d 1087 (3d Cir. 1989) 7, 13

Griffin v. Wisconsin, 483 U.S. 868 (1987) .. 9, 10, 24

Heartland Academy Community Church v. Waddle, 317 F.Supp.2d 984 (E.D. Mo. 2004) ...18, 19

Heartland Academy Community Church v. Waddle, 427 F.3d 525 (8th Cir. 2005) 19

Cited Authorities

Page

Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000) ...21, 22

Kiser v. Garret, 67 F.3d 1166 (5th Cir. 1995) ... 27

Meyer v. Nebraska, 262 U.S. 390 (1923) 10

Minnesota v. Dickerson, 508 U.S. 366 (1993) .. 9

New Jersey v. T.L.O. 469 U.S. 325 (1985) .... *passim*

O'Connor v. Ortega, 480 U.S. 709 (1987) 9

Pearson v. Callahan, No. 07-751 (U.S S.Ct. filed Dec. 4, 2007, *cert. granted*, March 24, 2008) . 26

Pierce v. Society of Sisters, 268 U.S. 510 (1925) .. 10

Roe v. Texas Dept. of Protective and Regulatory Services, 299 F.3d 395 (5th Cir. 2002) ..13, 17, 24, 25

Saucier v. Katz, 533 U.S. 194 (2001) 26, 27

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ... 9, 19

Sosna v. Iowa, 419 U.S. 393 (1975) 22

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000) 13, 25

Cited Authorities

Page

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 21

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*

Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993) 12, 15, 16

Williams v. Bitner, 455 F.3d 186 (3d Cir. 2006) ... 26

Wojcik v. Town of N. Smithfield, 76 F.3d 1 (1st Cir. 1996) 12, 15, 16

Wyman v. James, 400 U.S. 309 (1971) 24

Wyoming v. Houghton, 526 U.S. 295 (1999) 21

United States Constitution:

Fourth Amendment ..... *passim*

Statutes:

Wis. Stat. Ann. § 48.02 12

Wis. Stat. §48.981 5

Wis. Stat. Ann. § 48.981(3)(b)3 12

Cited Authorities

	Page
Wis. Stat. § 48.981(3)(c)1	5
Wis. Stat. Ann. § 48.981(3)(c)5m	12
Wis. Stat. Ann. § 939.22	12

Other Authorities:

Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413 (Nov. 2005) 2

Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921 (1997) 2

Jim Hopper, Ph.D., CHILD ABUSE: Statistics, Research, and Resources, *www.jimhopper.com* (Sept. 2008) 1

STATEMENT OF THE CASE

A. Summary

Petitioner asserts that there is a "nationwide epidemic" of child abuse and neglect necessitating this Court's attention to the application of Fourth Amendment constitutional protections to social workers. Pet. for Cert. at 2 (hereafter "Pet. __"). This assertion is at best questionable. While it is certainly true that *reports* of child abuse or neglect abound, resulting in myriad investigations, it is by no means clear that actual abuse or neglect has occurred in the majority of cases. Moreover, the statistics in this field are notoriously unreliable. *See, e.g.*, Jim Hopper, Ph.D., CHILD ABUSE: Statistics, Research, and Resources, *www.jimhopper.com* (Sept. 2008) ("All statistics on the incidence and prevalence of child abuse and neglect are disputed by some experts.").

The truth is that Child Protective Services ("CPS") frequently does more harm than good in its Rambo-style *modus operandi*, treating law-abiding parents wrongly charged with abuse or neglect as criminals.[1] Child abuse investigations routinely "undermine the fundamental values of privacy, dignity, personal security, and mobility

---

[1] Gresbach was "trained to try to meet with the child before contacting the parents because it minimizes the opportunity for the parents to coach the child to keep quiet, or to alter the child's version of what transpired." Pet. 5 (citing R-35-2 at 10). The irrebuttable presumption is that parents cannot be trusted to cooperate and can only taint the investigation. Further, it is "policy" that when one child is alleged to have been abused, the social worker will interview (and often perform physical examinations on) *all* the children, regardless of the lack of specific allegations of harm to them. *Id.*

that are protected by the Fourth Amendment." Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 418 (Nov. 2005) (observing that in over seventy percent of child abuse investigations nationwide the government is unable to demonstrate abuse, and arguing that "in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help"). Requiring confused and frightened children to remove all or part of their clothing is particularly invasive. *See* Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921, 930-31 (1997) (describing emotional impact of strip searches).[2]

Additionally, the vast majority of social workers interview children at *public* schools, not *private* schools. R.35-9 at 2 (estimating that the Bureau performs as many as 50 times the interviews at public schools that it does at private schools). Any perceived epidemic is therefore not precipitated by difficulties applying Fourth Amendment standards in *private* schools, where only a small fraction of the Bureau's cases arise anyway.

In short, as Professor Coleman argues, "[i]t is . . . wrong to abandon all respect for the values ensconced in the Fourth Amendment" simply in order to accommodate our burgeoning welfare system. The petition for certiorari should be denied.

---

[2] While Gresbach argues that she does not personally force children to remove all of their clothes, the authority she claims would equally allow her to require the children to strip naked. Her position is thus a distinction without a difference in the law of the matter.

B. Statement of Facts

1. First allegation

On January 16, 2004, the Bureau of Milwaukee Child Welfare ("the Bureau") received a report from the Milwaukee Police Department alleging physical abuse by Michael C. upon Ian W. R. 35-6 at 2. The reporter was Yvette Harris, Ian's aunt and sister of his biological father, Ismaa'eel Abdur-Rahim. *Id.* According to Harris, Abdur-Rahim had told Cherita, Ian's mother, "that the step father [Michael C.] is not to touch Ian." *Id.* Ms. Harris would pick Ian up from Cherita C.'s home and bring him to his every-other-weekend visit with his father "so the parents do not get into confrontations." *Id.* The police also spoke with Michael C., who cooperated fully. R. 35-7 at 2.

The police found "no neglect or maltreatment of children." *Id.* Dana Gresbach failed to note on her report form the date of the incident giving rise to the referral (R. 35-3 at 7), although she admitted this was an important fact. R. 35-7 at 3. That the police had actually been to the home and spoken with both the step-father and the child did not "make a hill of beans of difference" to Gresbach. R.35-5 at 4.

2. Second allegation

On January 30, 2004, the next time Abdur-Rahim had visitation with Ian, Ms. Harris made another referral, claiming this time that Ian told her that Michael C. had hit him two days earlier, on January 28, 2004. R. 35-7 at 2. But Ms. Harris did not report the alleged abuse *until five (5) days later*, on February 4, 2004. *Id.* On the afternoon of February 9, 2004, *twelve (12) days after the alleged incident*, Gresbach finally went to see the

child, making an unannounced visit to the school. R. 35-3 at 11. Gresbach failed in her written reports even to mention Cheryl Reetz, the principal, but Gresbach testified at length about an alleged conversation she had with Reetz at the school. R. 35-3 at 11-12.

According to Gresbach's recollection at her deposition, Reetz told her she had never been involved in anything like this before, did not know where they ought to report something if they encountered evidence of abuse, and did not even know what a mandated reporter was. R. 35-3 at 12. Gresbach said she gave Reetz some basic information as to how the system worked, and gave her a phone number for further information. *Id.* Gresbach could not believe that a school with so many "inner city children" would not be more experienced in child abuse investigations. R.35-3 at 13.

Gresbach never informed Reetz of her right to refuse permission for the interviews or her right to contact the parents. *Id.* When Reetz asked if she could call the parents, Gresbach told her "no." *Id.* The reason Reetz wanted to call the parents was to ask their permission for Gresbach's interviewing the children. R. 35-1 at 13. When Reetz asked if she could sit in on the interviews, Gresbach again told her "she didn't need to." R. 35-1 at 6. It made Reetz "nervous that somebody else would see the children without the parents' consent." *Id.* Allowing a stranger to talk to the children was "just something we generally don't do without parents knowing." R 35-1 at 7. Reetz would not have allowed anyone other than a government representative she thought had authority to interview children at the school. R. 35-1 at 13.[3]

---

[3] It is Gresbach's practice to allow no one else into the room with her when she interviews children. R.35-2 at 9. Neither does she videotape or record her interviews. *Id.*

Nonetheless, based on Gresbach's responses, Reetz believed she was legally obligated to comply with her demands and that she was legally prohibited from contacting or discussing the incident with the children's parents. R 35-1 at 14. In fact, Gresbach also believed at the time that she did not need permission, because under Wis. Stat. §48.981, she "had the legal right to interview children at any location without the parents' permission except in the home." R 35-4 at 13.[4] Therefore, it was Gresbach's practice not to ask permission for interviews at a school, even a private school. R. 35-3 at 14. It was also her practice not to allow anyone else into the room when she conducted her interviews, and the Bureau had "absolutely no standard" with respect to such matters. R. 35-2 at 9.

Gresbach was accustomed to performing physical examinations on many of the children she interviewed, and consequently did not discuss with her supervisor her intention to require the children to disrobe. R. 35-4 at 7. She estimated that she performed physical examinations in perhaps fifty percent (50%) of the cases she handled. R. 35-2 at 9. After all, it was her responsibility, she believed, that whenever there was an allegation of physical abuse on any part of a child's body "to make sure this child isn't being abused," which routinely meant examining the rest of his body, too. R. 35-4 at 6.

---

[4] The statute provides in pertinent part: "The agency may contact, observe or interview the child at any location without permission from the child's parent, guardian or legal custodian if necessary to determine if the child is in need of protection or services..." Wis. Stat. § 48.981(3)(c)1. *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003), found this statute "clearly unconstitutional as applied" to authorize "government officials to interview children suspected of being abused on private property without a warrant, probable cause, consent, or exigent circumstances." *Id.*

3. The Interviews with the Children

When Gresbach interviewed Ian, she looked at his wrist, where the alleged welt was said to have been, and saw nothing. R. 35-6 at 2. Undaunted, however, she then required Ian to lift his shirt and, apparently, to pull down his pants, as she stated that she observed his legs. *Id.* ("Ian was checked for suspicious injuries on his arms, back, chest and legs and no marks or scars were observed.").[5]

Gresbach then proceeded to interview Ian's step-sister, Alexis. R. 35-4 at 8. Alexis denied *ever* having received marks from a spanking (or "whooping"). *Id.* (Q: "So because her brother said he had a mark on his wrist and his forehead, you check Alexis who denies ever receiving a mark and ask her to disrobe?" A: "That's correct."). Gresbach nevertheless required her to pull down her tights in order that Gresbach could physically examine her. *Id.*[6]

---

[5] Gresbach implies that Ian told her he currently had other marks. Pet. 8 ("Ms. Gresbach asked if he had other marks. Ian said yes, ..."). In fact, in response to Gresbach's question whether he had *ever* had any marks, Ian responded that he had once had a bruise on his forehead. R35-4 at 5. He never said he had any marks still visible.

[6] Gresbach repeatedly refers to this invasive and embarrassing exercise of forcing a child to partially strip down to her underclothes while a complete stranger stares at her body as a mere "visual examination of non private areas," as if it were an everyday occurrence of no legal consequence. In fact, it is an invasion of basic human dignity of constitutional magnitude, as both lower courts correctly held. *See, e.g.*, App. 18a ("conducting a search of a child's body under his clothes, on private property, without consent or the presence of any other exception to the warrant requirement of the Fourth Amendment, is in direct violation of the child's constitutional

(Cont'd)

The Bureau recognizes that the search of a child's body is much more intrusive than simply asking questions, and that there is a difference in the type of consent required for the two actions. R. 58-2 at 18-19. But the Bureau has not defined "consent," R. 58-2 at 17, and has no procedures or guidelines in place concerning physical examinations and the need to obtain consent to perform them. R.35-4 at 6-7.

The file was eventually closed as "unsubstantiated."

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS BECAUSE THE "SPECIAL NEEDS" EXCEPTION APPLIES TO ABUSE INVESTIGATIONS IN *PUBLIC* SCHOOLS, NOT *PRIVATE* SCHOOLS.

Gresbach urges this Court to adopt a general "reasonableness standard" applicable to child abuse and neglect investigations on private school property "rather than the requirements of probable cause and a warrant." Pet. 15. She argues that the "special needs-general reasonableness" analysis applicable to searches in public schools should be applied to private schools as well.[7]

(Cont'd)

right to be free from unreasonable searches"); *see also Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087, 1092-93 (3d Cir. 1989) ("It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that, it is a violation of any known principle of human dignity.").

[7] She states that the "distinction between public and private schools is irrelevant to the question of whether probable cause or a reasonableness standard should be applicable to Fourth Amendment searches in the context of child abuse

(Cont'd)

As discussed below, "reasonableness" is not a generally applicable "facts and circumstances" test. Rather, this Court has determined that the "special needs" of *public* schools to conduct searches and maintain order entitle them to an exception to the Fourth Amendment's probable cause-warrant requirement, and "reasonableness" is simply the standard used in assessing the legality of a search only after the court makes the threshold determination that the "special needs" exception applies.

Additionally, this Court and the lower courts uniformly apply the "special needs-reasonableness" analysis to *public* schools only. While there may well be some divergence among the circuits applying that standard in public school contexts, there is no authority whatsoever for applying it to *private* schools, and Gresbach cites none.

A. "Consent" and "Exigent Circumstances" are the Traditional Exceptions to the Fourth Amendment's Probable Cause-Warrant Requirement.

Obviously, the "ultimate measure" of constitutionality under the Fourth Amendment is "reasonableness." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995). And "reasonableness" is determined by "balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests." *Id.* at 652-53 (citations omitted).

(Cont'd)
investigations," Pet. 15, that children's "expectation of privacy" in both "the public or private school setting . . . must be tempered by the realities of the school environment," Pet. 19, and that "there is no logical reason for distinguishing searches at private schools from those at public schools where the worker is properly on the premises." Pet. 21.

Contrary to Gresbach's assertion, however, "balancing interests" is not some amorphous, all-purpose, facts-and-circumstances rationale for whatever a social worker thinks she has good reason to do. Rather, this Court has established "carefully defined classes of cases" and the specific "standard[s] of reasonableness" that the "balance of interests" requires in each class. *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987).

For many years, "one governing principle, justified by history and by current experience, has consistently been followed: *except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.*" *Camara v. Municipal Court*, 387 U.S. 523, 5288-29 (1967) (emphasis added, citations omitted.)

In most cases, therefore, the balance of interests requires the "usual warrant or probable-cause requirements." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). This Court has noted "time and again" that "searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few *specifically established and well delineated exceptions.*" *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (emphasis added, citations and internal quotations omitted).Among those few "specifically established and well delineated exceptions" are consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), and exigent circumstances. *United States v. Karo*, 468 U.S. 705, 718 (1984). Exceptions are grudgingly granted because "the privacy interests protected by the Fourth Amendment are to be jealously guarded." *Wilson v. Health and Hosp. Corp. of Marion County*, 620 F.2d 1201, 1209 (7th Cir. 1980) (citations omitted).

Those rules apply on private school property the same as any other private property. A corporation has reasonable privacy expectations no less than a homeowner. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *Camara*, 387 U.S. at 523. Churches and private schools in particular have privacy expectations in their premises. *Curtis v. Thompson*, 840 F.2d 1291, 1300 (7th Cir. 1988) (citations omitted); *Simpson v. Saroff*, 741 F.Supp.1073, 1078-79 (S.D.N.Y. 1990). A private school's expectations of privacy are especially acute because private education is an exercise of fundamental familial liberties. *See generally*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

B. The Reasonableness Standard is not Applicable Outside the Narrow Class of Cases Qualifying for the "Special Needs" Exception.

Occasionally, government may have "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable cause requirement impracticable." *Vernonia*, 515 U.S. at 654 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal quotation marks omitted). In such cases, a lower standard may be appropriate "depend[ing] in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara*, 387 U.S. at 533 (citations omitted).

In *New Jersey v. T.L.O.* 469 U.S. 325 (1985), this Court addressed "the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case." *Id.* at 329. The Court first determined that a public school official was entitled to

the special needs exception in searching a student's purse for contraband. *Id.* at 340 ("The warrant requirement, in particular, is unsuited to the school environment . . . . [W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority."). The Court then determined that a general "reasonableness" standard was appropriate in determining the legality of the search. *Id.* ("[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

Contrary to Gresbach's urging, then, the *T.L.O.* Court did not create some all-purpose, peripatetic standard to be applied wholesale to any kind of official investigation. Rather, it directed that the "reasonableness" standard should be applied *only* after determining that the special needs exception applied to the public school official's search. *Id.* at 351 ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

Also contrary to Gresbach's claim, the special needs-reasonableness analysis does not apply to searches on *private* school premises. Its use is explicitly limited to assessing "the legality of searches conducted by *public* school officials . . . ." *Id.* at 329 (emphasis added). It is also inapplicable to searches conducted in cooperation with law enforcement. *Id.* at 342 n.7 ("We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law

enforcement agencies, and we express no opinion on that question."); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (government can justify warrantless searches under "special needs" exception only when "divorced from the State's general interest in law enforcement").[8]

II. THE CIRCUITS UNIFORMLY LIMIT THE SPECIAL NEEDS-REASONABLENESS ANALYSIS TO PUBLIC SCHOOL SEARCHES AND APPLY BASIC WARRANT EXCEPTIONS TO PRIVATE SCHOOL SEARCHES.

Gresbach asserts that the circuit courts are "inconsistent" and that the "lower courts are split" between applying the reasonableness standard and basic warrant exceptions. Pet. 11, 15. She cites only two cases for the "split," *Wojcik v. Town of N. Smithfield*, 76 F.3d 1 (1st Cir. 1996), and *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993). Pet. 18. She paints those cases with the broadest of brushes, without factual recitation or analysis. But as discussed below, *Wojcik* is a garden variety public school special needs decision following *T.L.O.* and *Vernonia*. *Wildauer* is a garden variety consent case, applying the basic Fourth Amendment principles and warrant requirement exceptions. There is no split in the circuits.

---

[8] In Wisconsin, a charge of physical abuse implicates possible criminal penalties. *See* Wis. Stats. Ann. §§ 48.02, 48.981(3)(b)3 and (3)(c)5m, and 939.22. The government's interests here, then, are not divorced from its general interest in law enforcement.

A. The Circuits Uniformly Apply the Warrant Requirement and Permitted Exceptions.

Gresbach claims that the circuits have "collapsed" the "reasonableness" test into four exceptions – warrant, probable cause, exigent circumstances, and special needs. Pet. 18. But the circuits aren't "collapsing" anything. Rather, as the following summary illustrates, they are uniformly applying this Court's basic Fourth Amendment principles in the context of child abuse investigations on private property.

Second Circuit: "[A]s discussed in connection with the Fourth Amendment implications of Sarah's removal from school, we find that the Fourth Amendment's reasonable or probable cause and exigent circumstances doctrines apply to searches and seizures made in the course of child abuse investigations." *Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000).

Third Circuit: "It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions . . . ." *Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087, 1092-1093 (3d Cir. 1989) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1970)).

Fifth Circuit: "[A] social worker must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances to justify the visual body cavity search of a juvenile." *Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 407-408 (5th Cir. 2002).

Seventh Circuit: "Because we conclude that [a private school and student] had a reasonable expectation of privacy in and within the school's premises, the defendants' warrantless search of the school and seizure of the child are presumptively unreasonable, . . . and can only be upheld if either falls within one of the 'few specifically established and well delineated exceptions' to the Fourth Amendment's warrant and probable cause requirements . . . ." *Doe v. Heck*, 327 F.3d at 513 (citations omitted).

Ninth Circuit: "[I]t was settled constitutional law that, absent exigent circumstances, police could not enter a dwelling without a warrant even under statutory authority where probable cause existed." *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999) (internal citations omitted).

Tenth Circuit: "The general rule is that a warrantless search conducted without consent is 'presumptively' unconstitutional unless it fits within certain narrow exceptions to the general rule." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003) (internal citations omitted).

B. The Circuits Uniformly Follow this Court's Limitation of the Special Needs-Reasonableness Analysis to Public School Searches.

Gresbach relies heavily on *T.L.O.*, but as already stated, the special needs-reasonableness analysis in *T.L.O.* is strictly limited to "the legality of searches conducted by *public* school officials . . . ." 469 U.S. at 329 (emphasis added). She also cites *Vernonia* for the proposition that there is no distinction between "the public or private school setting . . ." Pet. 19. But *Vernonia's* limitation of the special needs-reasonableness analysis to public schools could not

be more explicit: "In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints." *Vernonia*, 515 U.S. at 655.

Gresbach also cites *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), for the proposition that "probable cause and the warrant requirement did not apply in the context of a visual inspection of areas of a child's body as part of a child abuse investigation at a public school." Pet. 13. But *Darryl H.* has no application in a *private* school context because it explicitly follows *T.L.O. Darryl H.*, 801 F.2d at 900. The Seventh Circuit noted the obvious distinction in *Doe v. Heck*, 327 F.3d 492, 514 (7th Cir. 2003) ("The key difference between the searches at issue in *Darryl H.* and *Landstrom*, and the search and seizure in this case, is that the searches in *Darryl H.* and *Landstrom* took place on public school grounds with the consent of public school officials.")[9]

C. Gresbach Mischaracterizes *Wojcik* and *Wildauer*.

Gresbach claims that *Wojcik* and *Wildauer* apply a "general reasonableness" test. Pet. 18, 21-22. However, she provides no analysis, and completely mischaracterizes those authorities. *Wojcik* was a public school case, and the only

---

[9] Gresbach attempts to distinguish *Heck* and *Darryl H.* by suggesting that there were free exercise issues in those cases but not here. Gresbach is mistaken. Both *Heck* and *Darryl H* were pure Fourth Amendment cases. *Darryl H.* was also a public school case, and while *Heck* refers to free exercise interests, the court analyzed only Fourth Amendment claims, 327 F.3d at 509, familial relations (substantive due process) claims, *id.* at 517, and procedural due process claims, *id.* at 526. Neither case analyzed or decided a free exercise claim.

"novel element" was that school officials transported a child from one school to another in furtherance of their investigation. *Wojcik*, 76 F.3d at 3. *Wojcik* follows *T.L.O.* and *Vernonia*, and explicitly limits its analysis to public schools.

> The Fourth Amendment has been applied to public schools officials, primarily in the investigation of student misconduct or crime. *E.g.*, *Vernonia School District v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The Fourth Amendment, however, protects against unreasonable seizures. Nothing in the present facts made it unreasonable for the school, acting in loco parentis, to move one of the children from one school to another school in the vicinity, so that both children could be questioned together by a state official following upon a possible abuse report made by one of the teachers.

Wojcik, 76 F.3d at 3.

Gresbach's citation of *Wildauer* is even more misleading, because *Wildauer* is a garden variety "consent" case. Wildauer was a foster mother who challenged entry by a social worker and nurses into her unsanitary home to examine the foster children's health. The Fourth Circuit easily disposed of her claim based on consent: "Wildauer's consent to Cruger's entry is uncontested." *Wildauer*, 993 F.2d at 372. The court held: "Having consented to Cruger's entry, Wildauer could not deny access to the other members of the party." *Id.*

Moreover, the only claims analyzed by the court were Wildauer's claims that the entry and inspection of the

children violated *her* Fourth Amendment rights. The children were *foster* children *already* in state custody — the authority of the state to examine them was not at issue. The court simply noted that Wildauer's "attenuated" privacy interests were outweighed because she did not have legal custody, officials already had the right to physically examine the foster children, and the natural parents also had the right to enter Wildauer's house to retrieve their own children. *Id.* at 372–373.

Finally, Gresbach cites *Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 399 (5th Cir. 2002), for the proposition that there is a spectrum of applicable approaches. Pet. 22. Once again, however, *Roe* is a "consent" case that had nothing to do with a search on private school premises. *Roe* presented two questions, the initial entry into Mrs. Roe's home, and the physical examination of her daughter for sexual abuse. The district court found an issue of fact regarding entry into the home, but the Fifth Circuit held on appeal: "We avoid the first question by holding that Mrs. Roe consented to an investigative home visit." *Id.* at 400-401. The court found that she had consented to her daughters' physical examination as well. *Id.* at 399.

By contrast, neither the parents nor Principal Reetz had any opportunity to object to Gresbach's physical examinations of the children here, because Gresbach had forbidden Reetz from being present during the examinations, and had also forbidden Reetz from notifying the parents that Gresbach was seeing the children. Indeed, Reetz had no way of knowing Gresbach intended to require the children to disrobe, as Gresbach had not said anything about her intentions. *See* App. 6a, 14a, 35a. This case is a far cry from the circumstances in *Roe*.

D. The Circuits Uniformly Follow Black Letter Warrant Exceptions in Analyzing Searches on Private School Premises.

Lower court decisions applying the warrant requirement and exceptions to private school searches are limited but uniform.

In *Simpson v. Saroff*, *supra*, a private school principal alleged that she was arrested for refusing to allow police to enter the school building to question students who had fled there after reportedly committing a robbery and assault of other students just minutes before. *Id.* at 1075-76. Even in that extreme situation, the court denied a summary judgment motion by the police, who argued there was no violation of the principal's Fourth Amendment rights. *Id.* at 1073.

As discussed above, the Seventh Circuit applied black letter warrant-probable cause exceptions in *Doe v. Heck*, concluding that the social workers' "warrantless search of the school and seizure of the child are presumptively unreasonable, . . . and can only be upheld if either falls within one of the 'few specifically established and well delineated exceptions' to the Fourth Amendment's warrant and probable cause requirements . . . ." 327 F.3d at 513 (citations omitted).

The Eighth Circuit has likewise applied the traditional analysis to Fourth Amendment claims on private property. In *Heartland Academy Community Church v. Waddle*, the district court held: "In the context of removing a child from his home and family, a seizure is reasonable if it is pursuant to a court order, if it is supported by probable cause, or if it is justified by exigent circumstances, meaning that state officers 'have reason to believe that life or limb is in immediate

jeopardy.'" 317 F.Supp.2d 984, 1091 (E.D. Mo. 2004) (citations omitted). The court continued, "[t]he same standard for reasonableness applies when a child is seized from a private school where she has been placed by her parents." *Id.* (citing *Doe v. Heck*, 327 F.3d at 512) ("In our view, there is no basis for concluding that when a minor child is entrusted to the care of a private school *in loco parentis* his reasonable expectation of privacy, vis-a-vis government officials, differs in any material respect from that which he would otherwise expect to receive at home."). On appeal, the Eighth Circuit summarily affirmed: "Upon review of the record in this case, we conclude that the court's factual findings regarding the process employed by Waddle in obtaining the ex parte orders are not clearly erroneous. Likewise, upon de novo review, we see no error in the legal conclusions on the reasonableness of the seizures and the Fourth Amendment violation." *Heartland Academy Community Church v. Waddle*, 427 F.3d 525, 533 (8th Cir. 2005).

In this case, the Seventh Circuit analyzed Gresbach's consent defense under the same well-established rubric. Gresbach argued that her search was "objectively reasonable" because she had "general consent." App. 13a. The court noted that while a "search conducted pursuant to consent" is an "established exception to the warrant requirement," the search is reasonable only "as long as it remains within the scope of the consent." *Id.* at 13a-14a (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) and *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). But the consent exception is "grudgingly granted because `the privacy interests protected by the Fourth Amendment are to be jealously guarded.'" *Id.* at 13a (quoting *Heck*)

(additional citations omitted). The court then determined that Reetz's consent for Gresbach to interview the children did not include consent to inspect their bodies as well. *Id.* at 14a. The court concluded with the unremarkable proposition that social workers must be subject to "basic Fourth Amendment principles under non-exigent circumstances." *Id.* at 15a-16a.

III. THIS COURT HAS STRICTLY LIMITED THE *T.L.O.* "SPECIAL NEEDS" EXCEPTION TO SEARCHES ON PUBLIC SCHOOL PROPERTY, AND THERE IS NO NEED TO EXTEND IT TO PRIVATE SCHOOL PROPERTY.

A. There Is No Split Among the Circuits Applying the Special Needs Exception to Child Welfare Investigations.

Gresbach requests this Court to issue a writ to "settle the conflict in the lower courts as to whether the special needs doctrine applies [to] investigations of child abuse" by extending the special needs exception to all child welfare investigations on private school property. Pet. 16.

Gresbach assumes without discussion that there is, in fact, a split among the circuits on this point. But as discussed above, "reasonableness" and "special needs" are not separate and distinct analyses. Rather, "reasonableness" is simply the standard to be applied in special needs cases. This Court and the lower courts have appropriately limited the "special needs" exception to public schools, and Gresbach presents no authority for striking that limitation and creating virtually unlimited authority for social workers to seize and search children whenever and wherever they deem appropriate.

Gresbach cites *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829-830 (2002), but *Earls* was a drug investigation case that affirms this Court's long line of cases limiting special needs-reasonableness analysis to searches in *public* schools.

> Significantly, this Court has previously held that "special needs" inhere in the public school context. . . . . While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, . . . "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."

Id. at 829-830 (citing *Vernonia*, 515 U.S. 653, *T.L.O.*, 469 U.S. at 339-340, and *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506).

Gresbach also cites *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), and *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). *Brigham City* involved an officer entering a home without a warrant after observing a fight inside, and *Wyoming* involved a warrantless search of a driver's purse for contraband during a traffic stop. Neither addresses child welfare investigations, much less searches on private school property.

Finally, Gresbach cites *Kia P. v. McIntyre*, 235 F.3d 749, 759 (2d Cir. 2000). In that case, a private hospital held a new-born after detecting illegal drugs in her system. The Second Circuit noted its own decision in *Tenenbaum* declined to decide among three available standards for seizing a child to prevent abuse or neglect, "probable cause," "exigent circumstances," or the "less stringent" special needs-reasonableness standard.

Id. at 762. But of critical importance, the Second Circuit determined that the hospital, which already had custody of the children, was a state actor. *Id.*

Here, of course, the children were *not* in the custody of a state actor when Gresbach subjected them to the physical examinations. Instead, they were in the custody of a private actor on private property. Unlike the circumstances in *T.L.O.*, *Vernonia*, or *Earls*, then, application of the traditional Fourth Amendment analysis requiring probable cause or a warrant was in keeping with a long line of precedent on the matter.

B. Gresbach Failed to Raise this Argument Below.

Even if there were a split regarding application of a special needs-reasonableness analysis in child welfare investigations on private school premises, this is certainly not the case to mend it, much less create the new standard Gresbach urges, because she failed even to raise the argument in the district court and thus did not make a record for such a policy-sensitive determination. *See, e.g. Sosna v. Iowa*, 419 U.S. 393, 396 (1975) ("The failure of Iowa to raise the issue has . . . left us without any guidance from the parties' briefs . . . .").

Gresbach claims the district court found that "none of the exceptions to the warrant requirement, *including the special needs exception*, applied." Pet. 13 (emphasis added). That representation is factually inaccurate. Gresbach never argued or even mentioned "special needs" in her district court briefing. *See* R. 21, 54, 62. Not surprisingly, the district court decision does not mention it, either. Gresbach has therefore waived the argument, and should be precluded from asserting it here. *See Danforth v. Minnesota*, ___ U.S. ___, 128 S. Ct. 1029, 1046 (2008) (citations omitted).

Gresbach's failure to raise the special needs argument below is understandable, given the Seventh Circuit's rejection of the argument in *Doe v. Heck*. As the court stated below,

> *Heck* foreclosed the justification of the "special needs" exemption in this context, because states have "the ability to take immediate action to ensure the physical safety of a child suspected of abuse who is located on private property" through the exigent circumstances exception to the warrant requirement of the Fourth Amendment.

App. 15a n.3 (quoting *Heck*, 327 F.3d at 517 n.20).

Furthermore, having utterly failed to make a record on the issue, Gresbach relies on uncited, outlandish assertions. She claims that there were "3.6 million child abuse and neglect referrals in the year 2006," Pet. 2, that "[i]ncidents of child abuse and neglect occur every 10 seconds in America," Pet. 11, and that "[t]hese issues confront child protective services workers on a daily basis in every State in the country." Pet. 17.

This data is as unreliable as it is dangerous, as noted above. *See* Response at 1-2. Moreover, Gresbach's failure to raise the issue or create a record below deprives Respondents of the opportunity to develop a countervailing record or examine her assertions. Nevertheless, under any set of data, the special needs exception should not be extended here.

C. Applying the Special Needs-Reasonableness Analysis to *All* Child Welfare Investigations Would Swallow Both the General Warrant-Probable Cause Rule and the Consent and Exigent Circumstances Exceptions.

As explained above, this Court has already created a "special needs-reasonableness" exception for public schools in *T.L.O.* and *Vernonia*. The application of that exception to *all* child welfare investigation as Gresbach urges would swallow both the general warrant-probable cause rule and the consent and exigent circumstances exceptions with it.

Gresbach cites *Roe* in support of her position, but the two "special needs cases" analyzed by *Roe* do not support such a general application at all. *Roe* notes that in *Wyman v. James*, 400 U.S. 309 (1971), this Court upheld a New York law requiring AFDC recipients' consent to a home visit as a condition for continued benefits. The "application of the general reasonableness test was *dictum*" and did not even constitute a Fourth Amendment search. *Roe*, 299 F.3d at 405. In *Griffin*, *supra*, this Court permitted probation officers to search probationers' homes based on "reasonable grounds" because the probation system presented "special needs beyond normal law enforcement." *Roe*, 299 F.3d at 405 (citing *Griffin*, 483 U.S. at 874). Systematic supervision of convicted criminals certainly entails significant "special needs," but a probation system is not remotely comparable to merely investigating unconfirmed reports of possible maltreatment on private school premises or other private property.

Most telling, Gresbach simply ignores the result in *Roe* "that the special needs doctrine did not permit a social worker to visually search a child's body cavities as part of an abuse investigation without a warrant or exigent circumstances." *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404, 423 (5th Cir. 2008) (explaining the holding of *Roe*, 299 F.3d at 406-07).[10]

IV. THERE IS NO SPLIT IN THE CIRCUITS CONCERNING INVESTIGATIONS ON PRIVATE PROPERTY, AND EVEN IF THERE WERE, THE LAW WAS CLEARLY SETTLED IN THE SEVENTH CIRCUIT.

Gresbach makes the remarkable argument that she is somehow not responsible for knowing clearly established law within the Seventh Circuit because the law may be unsettled somewhere else. Pet. 26-30. Again, she cites no authority for such a proposition, perhaps because there is none.

Obviously, *Doe v. Heck* was well-established law when she conducted the investigation at issue here, even involving the same Bureau under very similar circumstances. As discussed above, there was no circuit split regarding investigations on private school property. But even if there had been, a split in the circuits is relevant to the "clearly established" analysis only when

---

[10] *Roe* also holds that a special needs exception is inappropriate where, as here, the inspection serves an investigative, prosecutorial function in addition to a child welfare function. *Id.*, 299 F.3d at 407. *See also Tenenbaum*, 193 F.3d at 606 (medical examination did not qualify for special needs exception where it was "undertaken at the initiative of a state official [and] serve[d] primarily an investigative function").

the case is one of first impression in the actor's *own* circuit and there are conflicting district court decisions within that circuit.

Even under those circumstances, the law may be sufficiently established in other circuits to impose liability. The Seventh Circuit has held that

> the absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in either court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worth while to litigate the issue. . . . To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages.

Burgess v. Lowery, 201 F.3d 942, 944 -945 (7th Cir. 2000). *See also*, *Williams v. Bitner*, 455 F.3d 186, 192-93 (3d Cir. 2006) (denying qualified immunity to prison officials who required Muslim inmate to handle pork, even though neither the Supreme Court nor the Third Circuit had directly addressed the issue).

Gresbach also references this Court's order directing briefing on the analytical framework set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), in *Pearson v. Callahan*, No. 07-751 (U.S S.Ct. filed Dec. 4, 2007, *cert. granted*, March 24, 2008). Pet. 13, 27. She seems to imply that the law might not have been clearly established because the social worker

defendants in *Doe v. Heck* were granted qualified immunity and were thus unable to appeal the Seventh Circuit's threshold determination rejecting the general reasonableness standard under *Saucier*.

Gresbach's own petition in this case exposes the flaw in her argument. Even assuming the *Heck* defendants could not petition for review of an unfavorable threshold decision under *Saucier*, they suffered no prejudice because they were granted qualified immunity. Nor does Gresbach suffer prejudice under *Saucier* – obviously she has the right to petition for review of an unfavorable decision on immunity, and is in fact doing so here.[11]

Perhaps alternatives to *Saucier* can be found, but whatever they may be, *Doe v. Heck* was clearly established law in the Seventh Circuit, and Gresbach has had full opportunity to challenge its holding at every stage of this litigation – in the district court, the Seventh Circuit, and now here.

---

[11] Returning to a pre-*Saucier* regime would no doubt be attractive to social workers, where constitutional violations have often continued indefinitely. Granting qualified immunity on grounds that the law was not "clearly established" precluded the opportunity to *ever* establish the law because, having dismissed the case, there was no opportunity to reach the merits. For example, in *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994), two social workers manufactured evidence of sexual abuse in order to remove a child from the father's custody. The court granted immunity because the father's "family integrity" right was "nebulous," *id.* at 1417, yet refused to reach the merits of that very right. Consequently, social workers in a subsequent seizure case were again awarded qualified immunity on the very same ground – that the "family integrity" right was "nebulous." *Kiser v. Garret*, 67 F.3d 1166 (5th Cir. 1995).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

MICHAEL D. DEAN
MICHAEL D. DEAN, LLC
20975 Swenson Drive
Suite 125
Waukesha, WI 53186
(262) 798-8044

STEPHEN M. CRAMPTON
Counsel of Record
MARY E. MCALISTER
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000

Attorneys for Respondents

Supreme Court, U.S.
FILED
OCT 6 - 2008
OFFICE OF THE CLERK

No. 08-220

IN THE

Supreme Court of the United States

DANA GRESBACH,

Petitioner,

v.

MICHAEL C., CHERITA C., KIMBERLY W., ALEXIS C, and IAN W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

MICHAEL J. MODL
Counsel of Record
BRIAN C. HOUGH
AXLEY BRYNELSON, LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 – fax
mmodl@axley.com
bhough@axley.com

Counsel for Petitioner

218569

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Respondents waived any issue of waiver concerning the application of the special needs doctrine when the Respondent failed to argue waiver before the Court of Appeals decided the merits of the special needs issue.

ARGUMENT

A. Because Respondents Chose To Not Argue Waiver At The Court Of Appeals, They Waived Any Issue Of Waiver.

Respondents argue that Petitioner waived review of the issue of whether the special needs doctrine is an exception to the Fourth Amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker. (Resp. Brief at 22-23). However, the parties argued this issue on the merits at the Court of Appeals, the Court of Appeals addressed the merits of this issue, and the Respondents chose to not raise the issue of waiver before the Court of Appeals. By not raising the issue of waiver at the Court of Appeals, Respondents waived any waiver argument they may have had.

It is well-settled that "a defense of waiver can itself be waived by not being raised." *Garlington v. O'Leary*, 879 F.2d 277, 282 (7th Cir. 1989); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1996). The Seventh Circuit has explained that where a party raises an argument for the first time on appeal, the court may consider that argument waived, but if the opposing party meets the issue on its merits without raising the issue of waiver, the waiver argument is waived. *Riemer v. Illinois Dept. of Trans.*, 148 F.3d 800, 805 n.4 (7th Cir. 1998).

At the Court of Appeals, Ms. Gresbach argued that the special needs doctrine is an exception to the fourth amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker. (Appellant's Brief, at 15-20). Respondents responded substantively as follows:

> Gresbach's discussion of the "special needs" exception to the Fourth Amendment hardly warrants a detailed response, especially in light of this Court's admonition in *Heck* that given the exigent circumstances exception, "there is no apparent justification for carving out a 'special needs' exception for child abuse investigations in this context."

(Respondents' Ct. App. Brief, at 14, n.19).

Respondents made no mention of waiver. The Seventh Circuit "hold[s] fast to the principle that a defense of waiver may itself be waived if not raised." *Westefer v. Snyder*, 422 F.3d 570, 584 n.20 (7th Cir. 2005). By simply attacking the merits of Ms. Gresbach's special needs argument and not raising the issue of waiver, Respondents waived any waiver argument they may have had.

B. The Supreme Court May Review Issues The Court Of Appeals Has Addressed.

The Court of Appeals ruled that the special needs doctrine was not an exception to the fourth amendment's warrant requirement in child abuse and neglect investigations by a child protective services worker. (App. 15a-16a). The Supreme Court may review any "ground considered and passed upon by the court

below." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000). Thus, in a case where there was a question of whether a party properly raised an issue in the district court, the Court concluded that "[t]hough we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also." *On Lee v. United States*, 343 U.S. 747, 750 n.3 (1952). Conversely, the Court refrains "from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) *citing Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976) (*per curiam*); *see Schiro v. Farley*, 510 U.S. 222, 228 (1994) ("We ordinarily do not review claims made for the first time in this Court.").[1]

In the present case, because the parties argued the merits of the special needs issue at the Court of Appeals without objection, and the Court of Appeals has addressed the merits of the special needs issue, there is no procedural impediment to review. The Petitioner provides no authority for the proposition that the Court may not review an issue the Court of Appeals has substantively addressed. Instead, the Petitioners merely cite to *Danforth v. Minnesota*, __U.S. __, 128 S. Ct. 1029, 1046 (2008), and *Sosna v. Iowa*, 419 U.S. 393, 396 (1975). Neither case advances Respondents' position. *Danforth* articulates the general and limited proposition that a

---

1. The practice of not addressing issues not raised in the Court of Appeals "is not inflexible." *Youakim*, 425 U.S. at 234. Thus, in exceptional cases, issues not passed upon in a lower court may be reviewed. *Id.* In the present case, the issue was passed upon by the Court of Appeals.

party may waive an untimely raised issue. *See id.* *Danforth* does not state that an issue the Court of Appeals has addressed on the merits may be inappropriate for Supreme Court review. *Sosna* does not advance Respondents' argument either. *Sosna* addresses whether a state may waive the defense of sovereign immunity if the issue is not first raised in the district court. In that case, the Court concluded that "the failure of the State to raise the defense of sovereign immunity in the District Court would not have barred Iowa from raising that issue in this Court." *Id.* at n.2 (citations omitted). Respondents' argument that the Court cannot review an issue addressed on the merits by the Court of Appeals is not supported by any authority and should be rejected.

Respondents offer no cogent explanation as to why the Court should not review a legal issue which the Court of Appeals has addressed on the merits. Respondents concede that the Court has a sufficient factual foundation for its legal analysis. In fact, according to the Respondents, the Court can analyze the special needs issue "under any set of data." (Resp. Brief at 23). Although Respondents complain that they failed to develop countervailing policy arguments below, (*id.*), Respondents are solely responsible for their strategic decision to not raise a waiver objection as well as their decision to not develop any policy arguments before the Court of Appeals. Respondents offer no reason why they cannot develop any policy arguments they may have at this stage.

Respondents have not even attempted to explain what interests could possibly be promoted by a rule which would allow one party to obtain the benefit of an appellate decision on the merits but would deprive the other party of the opportunity for review. Because Respondents offer no authority or even any theory as to why waiver should apply under these circumstances, the Court should reject their argument.

CONCLUSION

Respondents waived any issue of waiver, and the Court of Appeals addressed the merits of the special needs issue. The Supreme Court should reject Respondents' waiver argument so the Court can settle the conflict in the lower courts as to the issue of whether the special needs doctrine applies as an exception to the Fourth Amendment's warrant requirement in non-law enforcement investigations of child abuse, and to provide crucial guidance to child protective services workers around the country in conducting the millions of investigations performed annually.

Respectfully submitted,

MICHAEL J. MODL
Counsel of Record
BRIAN C. HOUGH
AXLEY BRYNELSON, LLP
2 E. Mifflin Street, Suite 200
Madison, WI 53703
(608) 257-5661
(608) 257-5444 – fax
mmodl@axley.com
bhough@axley.com

Counsel for Petitioner